

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA :
 :
vs. : No. SA:17-CR-00347
 : San Antonio, Texas
JEFFREY CLINTON MICHALIK(1), : August 30, 2019
Defendant. :

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

Tracy Thompson, Esquire
United States Attorney's Office
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
(210)384-7150; tracy.thompson@usdoj.gov

FOR THE DEFENDANT:

Edward A. Bartolomei, Esquire
Richard A. Bartolomei, Esquire
Jonathan R. Perez, Esquire
Law Office of Edward A. Bartolomei, P.L.L.C.
530 Lexington Avenue
San Antonio, Texas 78215
(210)225-0393; edward@eabartlaw.com

COURT REPORTER:

Angela M. Hailey, CSR, CRR, RPR, RMR
Official Court Reporter, U.S.D.C.
655 East Cesar E. Chavez Blvd., Third Floor
San Antonio, Texas 78206
Phone (210)244-5048
angela_hailey@txwd.uscourts.gov

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I N D E X**GOVERNMENT REBUTTAL EVIDENCE****GOVERNMENT WITNESS: PAGE****Special Agent Steve Nutt**

By Mr. Richard Bartolomei 6,21

By Ms. Thompson 18

JURY INSTRUCTIONSBy The Court (*read by Laura Cauley*) 77**CLOSING ARGUMENTS**

By Ms. Thompson 94,129

By Mr. Richard Bartolomei 107

By Mr. Edward Bartolomei 126

1 (August 30, 2019, 9:13 a.m.)

2 * * *

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated.

5 COURTROOM DEPUTY CLERK: SA:17-CR-00347, United States
6 of America versus Jeffrey Michalik.

7 THE COURT: Let's talk a little bit about logistics
8 here, if we can. So we currently have the government's expert
9 on cross. When that is done that will be the end -- I don't
10 think we have any more witnesses, do we?

11 MS. THOMPSON: No, Your Honor.

12 MR. EDWARD BARTOLOMEI: No, Your Honor.

13 THE COURT: All right. So at that point, we'll take a
14 recess. I need to do a few tweaks on the jury instructions,
15 the proposed jury instructions and then we will settle the jury
16 instructions which we have to do before final argument as you
17 know by rule. So we'll settle the jury instructions. Once
18 I've settled the jury instructions with you, which I don't
19 think is going to take a long time. I mean I try to put out a
20 fair set of jury instructions. I try to do a balanced and fair
21 set of jury instructions. This could be the first case, but in
22 31 years I've never been reversed for a bad jury instruction.
23 This could be the first one, knock on wood, because I don't
24 allow skew jury instructions for anybody. So once we settle
25 the jury instructions, then I will have Laura, if you have no

1 objection, read the jury instructions to the jury for me. Any
2 problem with that by the defense? I always have my law clerks
3 read it because it's very tough for me with my voice.

4 MR. EDWARD BARTOLOMEI: Not a problem, Judge.

5 THE COURT: So once that's done, then you'll go right
6 into closing argument. And depends upon where we are and
7 time-wise. It would be brilliant if we could get closing
8 arguments started before lunch. Are we ready?

9 MS. THOMPSON: Yes, Your Honor.

10 THE COURT: Okay.

11 * * *

12 COURT SECURITY OFFICER: All rise for the jury.

13 THE COURT: Please be seated. Good morning, ladies
14 and gentlemen. I try to keep my jurors as informed as I
15 possibly can in terms of what is happening. The witness we
16 have on the stand now is the last witness who will testify.
17 And so when counsel is done with any cross-examination and then
18 we have any redirect and we're done with that, then we're done
19 with all of the evidence in this case. At that point, I have
20 to take a short recess because I have to go over the jury
21 instructions with the lawyers. Okay. And then once we have
22 done that, we will bring you back. And my law clerk, Laura, is
23 going to read -- Laura Cauley, she's going to read my jury
24 instructions to you with the agreement of the parties because
25 it's real hard for me to read with my voice. And then we will

1 start closing arguments. And I've limited the lawyers to 40
2 minutes each because there's no need for them to go any longer
3 than that. Beyond that, they're just repeating things. This
4 is not that factually complicated a case. There are issues
5 which they need to cover obviously, but this case is largely a
6 credibility case for you, who you believe and who you don't
7 believe and I don't think I'm telling you anything new here.
8 You're going to find the facts and you're going to decide who
9 to believe and who not to believe. And once we get those
10 closing arguments done, you're going to start to deliberate.
11 I'm hoping we get all of that done, to be honest with you,
12 before lunch, but I could be wrong. If we don't, then we will
13 come back right after lunch and finish it up. I'm going to
14 order lunch for you. The government is going to pay for your
15 lunch from now on, including today. Where are they going to
16 go? Either Bill Miller's or the sandwich shop. Which would
17 you prefer?

18 (Pause.)

19 When I say "the government" I don't mean them. The
20 prosecution doesn't pay for your lunch, I promise you. It's
21 the court that pays for your lunch, okay. I don't want you to
22 think that they're paying for your lunch. It's not the U.S.
23 Attorney's Office or the Federal government in that sense, it's
24 the court that pays for your lunch and we're totally separate
25 from them. All right, so it's the court. I don't mean the

1 government. I don't mean them. Believe me. It's the court
2 that pays for your lunch. All right, are you ready to proceed?

3 MR. RICHARD BARTOLOMEI: I am, Your Honor.

4 THE COURT: Sir, I remind you that you remain under
5 oath.

6 CROSS-EXAMINATION

7 BY MR. RICHARD BARTOLOMEI:

8 Q. Mr. Nutt, do you remember when you testified that in
9 relation to record number 12, number 52 and number 90, that
10 they were accessed on three different times? Do you remember
11 your testimony? And if you could put up page eight of Exhibit
12 6b. Right now, sir, I'm just asking if you remember your
13 testimony.

14 A. Yes.

15 Q. And you said that record 12, record 52 and record 90 were
16 separate accesses of the file reflecting that it was accessed
17 three different times, remember?

18 A. Yes.

19 Q. Would you agree that a person can't -- well, would you
20 agree that three different files were actually created by the
21 computer, same time, all referencing the same subject matter,
22 isn't that really what happened?

23 A. No, this is three separate link files.

24 Q. Well, let's look at that.

25 MR. RICHARD BARTOLOMEI: Before we do, could you put

1 up page eight?

2 BY MR. RICHARD BARTOLOMEI:

3 Q. Turning to record number 12, see that?

4 MR. RICHARD BARTOLOMEI: May I approach?

5 THE COURT: Sure.

6 MR. RICHARD BARTOLOMEI: Well, I don't really need to
7 approach.

8 BY MR. RICHARD BARTOLOMEI:

9 Q. What's the time that it shows that the target file was
10 created?

11 A. 10/15/2015.

12 Q. Turning to record number 52, page 25, do you see it?

13 A. Record 52, yes.

14 Q. Same time, isn't it?

15 A. Yes.

16 Q. Turning to 90, page 40, exact same time, isn't it?

17 A. That's the time the accessed file was created, not the time
18 the link file was created.

19 MR. RICHARD BARTOLOMEI: Motion to strike as
20 nonresponsive. I asked whether or not it shows the exact same
21 time.

22 MS. THOMPSON: Your Honor, well, I'll object. It's
23 assuming incorrect facts that the witness is trying to
24 establish.

25 THE COURT: I am going to sustain that objection. I

1 remember his testimony. It does assume incorrect facts.

2 BY MR. RICHARD BARTOLOMEI:

3 Q. The fact is that's what it shows on the report, doesn't it,
4 exact same time?

5 A. It says target file created date, yes.

6 Q. And time?

7 A. Yes, of the target file which is the accessed file, not the
8 link file itself.

9 Q. I didn't ask about the link file at this point, so I'm
10 going to move to strike your testimony.

11 THE COURT: Well, I don't know. I think that's
12 confusing, so you need to rephrase your question.

13 MR. RICHARD BARTOLOMEI: Your Honor.

14 THE COURT: Or you need to clarify what the difference
15 is between the target file and the link file because you're
16 asking him about -- you're asking him about something that he
17 can answer either way depending upon which file. And there's
18 only one file I think that makes a difference here.

19 MR. RICHARD BARTOLOMEI: With respect, Your Honor,
20 that's what I'm trying to point out.

21 THE COURT: Okay.

22 BY MR. RICHARD BARTOLOMEI:

23 Q. Do you know what a hyper file is?

24 A. A hyper --

25 Q. Hyper file?

1 A. Yes.

2 Q. Do you know what a DAT file is?

3 A. Yes.

4 Q. Do you know what an allocable space is?

5 A. An allocated space, yes.

6 Q. Tell the jury what a hyper file is?

7 A. A hyper file is a file that takes essentially a snapshot of
8 the computer when you close the lid. That way when you open it
9 back up again, the computer knows where it was.

10 Q. You're saying it's controlled by the lid of the laptop?

11 A. The hyper file -- not necessarily. You can put the
12 computer in hibernation another way.

13 Q. The point is it's done by the computer itself, correct?

14 A. The hyper file is, yes.

15 Q. And the DAT file is done by the computer itself, correct?

16 A. Yes.

17 Q. And there's also an allocable space that a hyperlink can go
18 into, correct?

19 A. Yes.

20 Q. And in this particular instance, am I correct that many if
21 not all of the images in 6b could not be viewed directly on the
22 file by a regular user, isn't that true?

23 A. Could you repeat the question again?

24 MR. RICHARD BARTOLOMEI: Could you read it back
25 please?

1 * * *

2 *(Court reporter read back the last question.)*

3 * * *

4 A. 6b doesn't contain the images.

5 Q. It contains reference to images, correct?

6 A. But it's not the --

7 Q. Does it contain reference to images?

8 A. References to images, yes.

9 Q. Thank you. You didn't look at all the images, correct?

10 A. No, I did not.

11 Q. So you could not say from examining the computer whether or
12 not there was an image that would have been visible to a
13 regular user because you didn't look yourself, correct?

14 A. This report does not contain images.

15 MR. RICHARD BARTOLOMEI: Motion to strike as not
16 responsive.

17 THE COURT: No, it's not nonresponsive. You asked him
18 whether he accessed images and he told you that the report
19 doesn't contain images which is an answer to your question,
20 isn't it?

21 MR. RICHARD BARTOLOMEI: Not exactly, Your Honor.

22 THE COURT: I think it is.

23 BY MR. RICHARD BARTOLOMEI:

24 Q. Turning back to the comparison of record 12 on page eight,
25 record 52, I'm not asking it be put up and record on 90. All

1 of the target file created times are exactly the same date and
2 exactly the same time?

3 MS. THOMPSON: Objection, asked and answered.

4 MR. RICHARD BARTOLOMEI: No.

5 THE COURT: I'll overrule that objection.

6 BY MR. RICHARD BARTOLOMEI:

7 Q. Record 90 is on page 40. Record 52 is on page 25. They're
8 all the same time, right? To the second?

9 A. Yes.

10 Q. And then you said target file last accessed. They're the
11 identical time as the target file creation date for all three
12 files, correct?

13 A. Yes.

14 Q. So a person couldn't simultaneously touch the computer and
15 access all three files at the exact same instance, wouldn't you
16 agree?

17 A. The target file is the same file on each of these three
18 records. It's not three different files.

19 Q. That's my point. All three of these are created from one
20 action, correct?

21 A. No, that's not correct.

22 Q. So are you testifying that even though the target file
23 creation date and time and the target file last access are
24 identical for all three, that they would have taken three
25 separate actions by a user or will you acknowledge that could

1 not occur?

2 A. No, it's three separate actions.

3 Q. All at the same time, right?

4 A. The records --

5 Q. Excuse me. All at the same time? That's what you're
6 saying?

7 MS. THOMPSON: Your Honor, I'm going to object. This
8 is a mischaracterization of the testimony.

9 THE COURT: Sustained.

10 MR. RICHARD BARTOLOMEI: Your Honor, I think I'm
11 entitled to examine --

12 THE COURT: He's already testified that it wasn't
13 created at the same time necessarily. He's testified to that.
14 And now you're asking him again and again whether it was
15 created at the same time. He's already told you no.

16 BY MR. RICHARD BARTOLOMEI:

17 Q. Target file last accessed. You testified the other day,
18 did you not, that with regard to, say, 6a -- excuse me, Six,
19 you said that the access time, Windows doesn't update, correct?

20 A. Correct.

21 Q. In fact, sir, Windows does update, but they do it later,
22 but they refer back to the original time, isn't that what
23 Windows does, Windows 10?

24 A. No, that's not what it does.

25 Q. Do you know that for a fact?

1 A. Yes.

2 Q. You have checked to see whether the access time even though
3 it's identical is never updated by Windows, is that what you're
4 saying?

5 A. Yes.

6 Q. So target file last access in 6b doesn't mean anything,
7 correct?

8 A. Correct.

9 Q. And turning to your link files, you would agree that all of
10 the link files that you refer to in record 12, record 52 and
11 record 90, according to your own report, they're all created at
12 the identical time and the identical seconds?

13 A. No.

14 Q. Isn't that true?

15 A. No, that's not what this report says.

16 Q. I'm going to go through them one at a time. Twelve please
17 and that would be page eight. Do you see it?

18 A. Yes.

19 Q. And it very clearly says, does it not, target file created
20 date and time, 10/15, 12:44:03, correct?

21 A. The target file is Open-F07.jpg, not the link file.

22 Q. All right. JPG is an image file, correct?

23 A. Correct.

24 Q. And the word "open" doesn't mean that it was opened, that's
25 just the name of the file, correct?

1 A. Correct.

2 Q. So when you testified about the significance or meaning of
3 the word "open" using Exhibit 12, doesn't it say Open
4 Collection, correct?

5 A. That's the name of the folder.

6 Q. That's right. It doesn't mean it was open, that's just the
7 name of the folder, correct?

8 A. I never said it did.

9 MR. RICHARD BARTOLOMEI: Motion to strike as
10 nonresponsive.

11 MS. THOMPSON: It is responsive and he's
12 mischaracterizing the testimony. That's what's causing the
13 confusion.

14 THE COURT: Re-ask the question in a slightly
15 different way and you might get an answer. I'm not going to
16 strike the answer because I don't think it was nonresponsive.
17 BY MR. RICHARD BARTOLOMEI:

18 Q. Open Collection does not reflect an action by the computer,
19 it's just the name of that portion of the pathway, correct?

20 A. Correct.

21 Q. And Open F107.jpg doesn't mean it's opened, that's just the
22 name of the file referred to, that portion in the pathway,
23 correct?

24 A. Correct.

25 Q. Turning to page 52 -- excuse me, record 52, page 25. I am

1 correct, am I not, target file, created date and time
2 10/15/2015, 12:44:03 a.m., that's what it reflects, correct?

3 A. Correct.

4 Q. And that's something the computer assigns to it, correct,
5 tells you from the computer program of the C drive or whatever
6 drive that that's the time the file was created, correct?

7 A. The JPG file, not the link file.

8 Q. Sir, at the end of the pathway it says Open F07.jpg,
9 correct?

10 A. Correct.

11 Q. That's the same one as 12, correct?

12 A. Correct.

13 Q. And it tells you that that file was created at 10/15/2015
14 at exactly the same time as 12, doesn't it?

15 A. It's the same file. The target file is the same --

16 Q. Thank you. So what you're saying then, sir, is it doesn't
17 show when or if there are separate accesses to the same file,
18 isn't that true?

19 A. The fact that there are two link files shows that there are
20 separate access.

21 Q. But they're the same link file, aren't they?

22 A. No, they're two different link files for the same image
23 file.

24 Q. And what's the time of -- let's go to 90 first. Page 40.
25 See it?

1 A. Yes.

2 Q. There's a pathway and it ends in Open F107.jpg?

3 A. Yes.

4 Q. Same file, correct?

5 A. Same image file.

6 Q. That's right. Same image file?

7 A. Correct.

8 Q. And once again target file created date/time is exactly the
9 same as it was in 12 and exactly the same as it was in 52,
10 correct?

11 A. Yes, that's the same image file.

12 Q. And there is nothing under any one of those three files
13 that shows any different access time by a user or by the
14 computer other than that same time and same date for each file,
15 isn't that true?

16 A. These records don't show the time the file was accessed,
17 correct.

18 Q. So there is nothing -- I'm just going to ask it. Am I not
19 correct that all of these references to Open F07 are all
20 created at the very same instant and they are put in different
21 places within the computer by the computer, isn't that true?

22 A. No, that's not true.

23 Q. Well, you would agree that if a person were actually using
24 the file, accessing FP or F7.jpg, they can't hit the button to
25 access it themselves three times at the same instance, correct?

1 MS. THOMPSON: Your Honor, objection, argumentative
2 and asked and answered.

3 THE COURT: Sustained.

4 BY MR. RICHARD BARTOLOMEI:

5 Q. Can a person access three files by pushing a button on the
6 computer and access all three files at the same time? Can that
7 physically be done?

8 A. Three files, no.

9 Q. Now, let's talk about the times on 6b. That's not the time
10 of day here in Texas, is it?

11 A. No, this is UTC time.

12 Q. And UTC time differs by Texas time by how many hours?

13 A. Five hours -- six hours for standard time, five hours for
14 daylight saving time.

15 Q. So these times that you show in the a.m., they're not
16 actually the time that a user would have done something to
17 generate this data, correct? It's a different time.

18 A. When you convert, no.

19 Q. That's what I was asking. When is 6b run, it's on
20 August 20, isn't it?

21 A. Yes.

22 Q. That's during this trial, isn't it?

23 A. I believe it was the day before it started, the day before
24 testimony started.

25 Q. Did you direct Agent Linares to run that or did you run it?

1 A. I directed him to run it.

2 Q. And you advised him why you wanted it run, didn't you?

3 A. Yes.

4 Q. And it was to try to find other evidence of somebody
5 accessing something, correct?

6 A. Yes.

7 Q. But if you look all the way through 6b, just like Six,
8 there is no forensic evidence whatsoever that establishes that
9 the defendant ever did anything to access those files, isn't
10 that true?

11 A. A specific person, no.

12 MR. RICHARD BARTOLOMEI: Thank you, sir. I pass to
13 the government.

14 REDIRECT EXAMINATION

15 BY MS. THOMPSON:

16 Q. Special Agent Nutt, with regard to -- let's look at record
17 90 on page 40. Record number 90 is the link file, correct?

18 A. Correct.

19 Q. And in the linked path, that's what shows the actual image
20 file of Open-F07, correct?

21 MR. RICHARD BARTOLOMEI: Leading.

22 THE COURT: Sustained.

23 BY MS. THOMPSON:

24 Q. What does the linked path show?

25 A. It shows the file that was accessed.

1 Q. Right under that is the target file created date and time.
2 What does that refer to?

3 A. That refers to the date and time that the file F -- excuse
4 me, the date and time the file Open-F07.jpg was saved on the
5 computer.

6 Q. Is that why all three records, 90, 52 and 12 have the same
7 target file creation date?

8 A. Yes.

9 MR. RICHARD BARTOLOMEI: Leading.

10 THE COURT: Yes. Sustained. Just ask why.

11 BY MS. THOMPSON:

12 Q. Why are all those dates the same?

13 A. Because each of those three records refers to the exact
14 same image file.

15 Q. How do you know that those three -- that that one file was
16 accessed three different times?

17 A. I know there's three link files because if you go further
18 down, if you go down to where it says Source and Location, the
19 location is the physical spot on the computer on the hard drive
20 where this link file was found. Each of those three records is
21 a different location. That's why I know it's three different
22 files.

23 Q. You talked about an IP address being assigned to a router
24 in a location, correct?

25 MR. RICHARD BARTOLOMEI: Your Honor, that's certainly

1 beyond the scope of my cross.

2 MS. THOMPSON: He asked about the IP address
3 yesterday.

4 THE COURT: Overruled.

5 MR. RICHARD BARTOLOMEI: I did?

6 THE COURT: Yes, you did. You asked about the IP
7 address.

8 BY MS. THOMPSON:

9 Q. If the Internet access is secure, what is needed to access
10 Internet at a specific location?

11 A. The --

12 MR. RICHARD BARTOLOMEI: Objection, Your Honor, if I
13 may. Not only is it leading and suggestive, but it's premised
14 upon something not in evidence.

15 THE COURT: She asked what is necessary -- no, it is
16 not. The objection is overruled.

17 A. The user would need both the name of the wireless network
18 and the password.

19 Q. Would the operating system being used on the forensic
20 computer affect the forensic report in any way?

21 A. It might affect the formatting of the report, but it's not
22 going to affect the data that's in the report.

23 Q. You were asked yesterday about the security ID on
24 Government Exhibit Six, page three. What is a security ID?

25 A. It's an ID that the computer generates and it's assigned to

1 a specific user on that computer.

2 Q. If for instance in on the Dell laptop computer if there's
3 only one user account, would there ever be a different security
4 ID?

5 MR. RICHARD BARTOLOMEI: Objection, Your Honor.
6 Leading and suggestive.

7 THE COURT: No, she's saying would there ever be,
8 she's not suggesting that there was. Overruled.

9 A. No, if there's no other user, there's not going to be
10 another S ID on it.

11 MS. THOMPSON: Thank you, I have nothing further.

12 RECROSS-EXAMINATION

13 BY MR. RICHARD BARTOLOMEI:

14 Q. You never checked to see whether there was a password that
15 was required for the use of this computer, the laptop, isn't
16 that true?

17 MS. THOMPSON: Objection, beyond the scope of
18 redirect.

19 MR. EDWARD BARTOLOMEI: No.

20 THE COURT: Just a minute. Who else chimed in here?

21 MR. EDWARD BARTOLOMEI: My apologies, Your Honor.

22 THE COURT: Thank you for your apology. I appreciate
23 it. The objection is sustained.

24 BY MR. RICHARD BARTOLOMEI:

25 Q. Did you ever in any of these --

1 THE COURT: I beg your pardon. Let me think about
2 that. What was the question again?

3 MR. RICHARD BARTOLOMEI: It's just did he ever check
4 to see --

5 THE COURT: The objection is overruled.

6 BY MR. RICHARD BARTOLOMEI:

7 Q. You never checked to see whether the Internet access from
8 this computer was password protected, isn't that true?

9 MS. THOMPSON: Objection, confusing and impossible to
10 answer. The Internet access on the computer is confusing and
11 misleading.

12 THE COURT: Why is that?

13 MS. THOMPSON: There's Internet access on a router.

14 THE COURT: I think he's asking about the personal
15 computer itself, are you not?

16 MR. RICHARD BARTOLOMEI: Well, I'm going to get to the
17 next part.

18 THE COURT: What are you actually asking? So she's
19 right because now that I think about it, even I'm confused.
20 Are you asking about the computer itself which could or could
21 not have a password or are you asking about the router which is
22 the home Internet? What are you asking about? Are you asking
23 about both?

24 MR. RICHARD BARTOLOMEI: I'll start with the Internet,
25 whether there's a password from the computer.

1 THE COURT: Wait. There is no such thing as that.
2 There is no such thing as a password from the computer to the
3 router. You can have a password for your Internet, like you go
4 to somebody's house and you want to use their Internet, you
5 have to ask them either for the -- if they don't have the
6 guest, they could have a guest account or they can have an
7 actual account that they use or they both might be password
8 protected. If you go to somebody's house and say, gee, can I
9 use your Internet so I can have Internet on my iPhone, let's
10 say --

11 MR. RICHARD BARTOLOMEI: I think I can simplify.

12 THE COURT: -- then you would have to have that, but
13 that's different from the password to get into your iPhone,
14 okay, so you can open up.

15 MR. RICHARD BARTOLOMEI: And I can simplify that.

16 BY MR. RICHARD BARTOLOMEI:

17 Q. You never checked to see whether there was a password to
18 even open the computer that's in question, isn't that true?

19 MS. THOMPSON: Objection. That's beyond the scope of
20 redirect.

21 THE COURT: Overruled.

22 BY MR. RICHARD BARTOLOMEI:

23 Q. You never checked, did you?

24 A. I did not.

25 Q. You don't know whether it's password protected or not then,

1 correct?

2 A. I know it's not password protected.

3 Q. And when the judge mentioned and counsel mentioned about a
4 password to the Internet through the router, did you ever
5 determine if there was a password through the router meaning
6 from there to the Internet?

7 A. I don't recall if there was or not.

8 *(Pause.)*

9 MR. RICHARD BARTOLOMEI: Mr. Nutt, no further
10 questions.

11 THE COURT: Do you have anything else, counsel?

12 MS. THOMPSON: No, Your Honor.

13 THE COURT: Okay, Agent Nutt, you can step down.
14 Thank you.

15 All right. Anything further, counsel?

16 MS. THOMPSON: Nothing from the government.

17 MR. EDWARD BARTOLOMEI: Nothing further from the
18 defense, Your Honor, at this time.

19 THE COURT: So both sides have rested. Ladies and
20 gentlemen, as I told you this morning now we need to get
21 together and work on these jury instructions. I don't think
22 it's going to take us a lot of time, but I can't guarantee it.
23 And so we're going to take --

24 COURTROOM DEPUTY CLERK: I need to get them to fill
25 out their menus.

1 THE COURT: I don't think they're going to object to
2 filling out their menus. Will you? I'm going to let Priscilla
3 make the call as to whether it's the sandwich shop because I
4 don't want the jury fighting before they need to be fighting,
5 all right. There's no sense in pitting one against the other.
6 So what is going to happen is -- I don't want you just sitting
7 in there, okay. That's an awful little room to sit in for no
8 good reason. So what I'm going to do is ask that you fill out
9 your menu. And then I'm going to give you until about -- it's
10 ten minutes to 10:00 -- about 10:30. So you can go out, walk
11 around, get some fresh air, do whatever you'd like to do, make
12 telephone calls, whatever you need to do. And be back by
13 10:30. I can't guarantee we'll be ready by 10:30, but I'm
14 hoping hope springs eternal here. Thank you. You can be
15 excused.

16 MR. EDWARD BARTOLOMEI: For the record, we have some
17 motions of proof, Your Honor, we'd like to make.

18 THE COURT: That isn't done before the jury.

19 MR. EDWARD BARTOLOMEI: I understand.

20 THE COURT: That's why I need to let them go.

21 COURT SECURITY OFFICER: All rise for the jury.

22 *(9:50 a.m., jury exits.)*

23 * * *

24 THE COURT: What are your offers of proof?

25 MR. RICHARD BARTOLOMEI: Can we just reference their

1 identification numbers?

2 (Pause.)

3 THE COURT: I'm waiting.

4 MR. RICHARD BARTOLOMEI: We need to get this on the
5 computer.

6 THE COURT: What is this on the computer?

7 MR. RICHARD BARTOLOMEI: Priscilla sent us a list of
8 what was identified. We can do this after the jury
9 instructions, if you prefer.

10 THE COURT: No, let's do it now.

11 (Pause.)

12 I'm waiting.

13 MR. RICHARD BARTOLOMEI: We're unable to find the
14 proper link file.

15 THE COURT: I'm here.

16 COURTROOM DEPUTY CLERK: Do you want me to print you
17 another copy?

18 MR. RICHARD BARTOLOMEI: If you could.

19 (Pause.)

20 MR. EDWARD BARTOLOMEI: Your Honor.

21 THE COURT: Yes, sir.

22 MR. EDWARD BARTOLOMEI: 11a would be the other one.

23 THE COURT: I don't know what it is you're talking
24 about, so let's wait until we get everything together.

25 COURTROOM DEPUTY CLERK: This is their 11a that they

1 identified.

2 MS. THOMPSON: I don't have a copy of that.

3 *(Pause.)*

4 MR. RICHARD BARTOLOMEI: I'm ready, Your Honor.

5 THE COURT: Do you know where we are, counsel? Are
6 you ready.

7 MS. THOMPSON: Yes.

8 THE COURT: Okay. What is it that you want to do?

9 MR. RICHARD BARTOLOMEI: Well, we had offered 7a.

10 THE COURT: What is 7a?

11 MR. RICHARD BARTOLOMEI: 7a was the detection of
12 external virus and the warning and that is we sought to
13 introduce that.

14 THE COURT: I need to see 7a. This is the one that's
15 on the -- the problem was that it isn't on the laptop, it's on
16 the desktop, am I right? Is that the one?

17 MR. RICHARD BARTOLOMEI: I believe that was your
18 determination.

19 THE COURT: It's not my determination. You can see
20 that. I'm not from outer space. You can see that that's a
21 desktop monitor.

22 MS. THOMPSON: In addition, Your Honor, it's dated
23 May 6th of 2017 in the bottom right-hand corner.

24 THE COURT: Which is way after this case.

25 MR. RICHARD BARTOLOMEI: And well before the seizure

1 of the computer, isn't it?

2 THE COURT: No. The laptop was seized in 2015.

3 MR. RICHARD BARTOLOMEI: I misspoke, Judge. Let me
4 correct myself.

5 THE COURT: All right.

6 MR. RICHARD BARTOLOMEI: The point is what we're
7 trying to put in there is to show this happens.

8 THE COURT: What happens?

9 MR. RICHARD BARTOLOMEI: Let me finish, if I could.
10 Before or after doesn't mean it doesn't happen in the world.
11 And that's the same thing with 7g which is why we attempted to
12 offer that because simply saying that something occurs after,
13 the jury might wish to consider that in determining whether or
14 not there are such invasions of a computer.

15 THE COURT: Well, you know, in this case, one of the
16 main issues is whether this -- your theory of the case is that
17 somehow some unknown person or individual or individuals, who
18 knows who, got into his computer before it was seized and
19 injected it with child pornography. That is your theory. And
20 to put this up is very, very misleading because it gives the
21 impression to the jury that this is his computer before it was
22 seized and it isn't. Just flat isn't. And that is very
23 confusing. Now, look, these jurors didn't leave their common
24 sense at the courtroom door. They are entitled to take with
25 them into the jury room their common sense. I have no problem

1 whatsoever with you arguing to the jury that there are -- and
2 they know from their own experience that there are instances
3 where computers get viruses and get hacked. That's fine, but
4 to put a picture in that shows another computer at two years
5 later getting a warning sign -- and by the way, we don't even
6 know whether this is a legitimate warning sign. Do you know
7 that?

8 MR. RICHARD BARTOLOMEI: Your Honor, I didn't get to
9 put it in because I wouldn't have been able to examine that, so
10 that would have been beyond the scope of the offer because I
11 wasn't permitted to put it in, so I couldn't develop that
12 legitimacy, that type of thing.

13 THE COURT: We don't even know whether it's true. One
14 of the big hacks -- I told you and this is just plain old --
15 the Court will take judicial notice of the fact that there are
16 fishing e-mails out there that replicate virus services like
17 MacAfee, which by the way I think -- is MacAfee the one that's
18 owned by the Russians? That's Kapersky. The Russians own the
19 Kapersky one.

20 MR. RICHARD BARTOLOMEI: We'd like to call Mr. Muller.

21 THE COURT: I know Bob Muller very well, believe me.
22 You want to come in my chambers, you'll see a picture of me and
23 Bob Muller together. We've known each other for decades.

24 MR. RICHARD BARTOLOMEI: That was the nature of my
25 offer, Your Honor. You asked me about showing some other proof

1 and obviously I couldn't go into anything after that.

2 THE COURT: What is the proof? The proof is, Oh, this
3 happens?

4 MR. RICHARD BARTOLOMEI: That is correct.

5 THE COURT: You can tell them that it happens, but I'm
6 not going to put a picture in showing unknown PC or device
7 detected, leaving the jury with the impression that this was
8 this computer, which it isn't. And as I said, we don't even
9 know whether this is legitimate. Because what they do is --
10 you'll get a thing on your computer which will say your
11 computer has been compromised, click on here. And then it
12 sends you either to an advertising site so you can buy
13 something or it will send you to a viral site where you can
14 find your computer has been attacked by them and then they want
15 money to unattack your computer.

16 MR. RICHARD BARTOLOMEI: This one didn't have that,
17 but it may have been the next step. I can't say.

18 THE COURT: We don't know whether --

19 MR. RICHARD BARTOLOMEI: The actual message doesn't
20 request money or anything else.

21 THE COURT: It says, Open network map. And if you hit
22 that, God only knows where it takes you.

23 MR. RICHARD BARTOLOMEI: That's my point. When you
24 asked me or you mentioned certain things --

25 THE COURT: Well, if this is your point on appeal, I

1 will agree with you that I did not let you get this in because
2 it is more confusing, it is more prejudicial than it is
3 probative. And I have no problem, you arguing to the jury in
4 closing -- I don't know whether you're going to do it or your
5 brother is going to do it, but whoever does it, arguing that
6 there are dozens of opportunities out there and people are
7 always trying to get into people's computers and fish for their
8 log in credentials. There's no question about that. I'll take
9 judicial notice of that. There isn't a single judge here
10 that -- I know a Supreme Court Justice, I know several of the
11 Supreme Court Justices well. Justice Alito, Justice Breyer I
12 know, Sotomayor, Ginsburg. They've all been out to Hawaii,
13 Chief Justice Roberts. The only one actually I don't know is
14 Justice Kagan. I know that one of the justices I know, as a
15 matter of fact, had a serious attack made on their computer
16 which fortunately they didn't fall for, but we discussed it
17 when he was in Hawaii. So yes, you can make that argument, you
18 don't need this picture.

19 MR. RICHARD BARTOLOMEI: Thank you, Your Honor.

20 THE COURT: Next.

21 MR. RICHARD BARTOLOMEI: That encompasses 7g as well,
22 correct?

23 THE COURT: I don't know what 7g is.

24 MR. RICHARD BARTOLOMEI: 7g was the malicious spyware.

25 THE COURT: What was the date on this?

1 MS. THOMPSON: Your Honor, there's no date. From the
2 bottom of the picture, it appears to be on a desktop computer.

3 THE COURT: This is the one that was on the desktop
4 computer, we don't know whether it's legitimate or isn't
5 legitimate. We have no date whatsoever, we don't know what
6 computer it came from. Yeah, it's just not probative in this
7 case.

8 MR. RICHARD BARTOLOMEI: I just wanted to make sure
9 that we had addressed both.

10 THE COURT: You addressed both. It isn't a bit
11 probative. We don't know what computer, we don't know when, we
12 don't know where it came from. We don't know whether it's
13 legitimate or it isn't legitimate. This was one of the first
14 fishing scams that ever came out, I was told, and it's still
15 around because I get it all the time.

16 MR. EDWARD BARTOLOMEI: Your Honor, when the Court was
17 giving its jury instruction --

18 THE COURT: I didn't give a jury instruction.

19 MR. EDWARD BARTOLOMEI: I mean explaining the
20 procedures to explain to the jury where we were in the time and
21 place of the court, Your Honor, we would object, Your Honor.

22 THE COURT: To what?

23 MR. EDWARD BARTOLOMEI: To the statements that this is
24 a very simple case, Your Honor, that it comes down to a
25 credibility issue, Your Honor.

1 THE COURT: I said they find the evidence and they
2 find the credibility of the witnesses. That's what I said. It
3 isn't a complex case like a case that involves 25,000
4 documents, which I have had involving four months worth of
5 testimony and seven defendants. You want me to clarify that to
6 the jury. I'll be more than happy to. I said they find the
7 facts. I clarified and I said they find the facts -- can you
8 find that?

9 *(Off the record.)*

10 * * *

11 *(Whereupon the court reporter read back the record*
12 *from page 5, lines 3 - 10:*

13 *"This is not that factually complicated a case. There*
14 *are issues which they need to cover obviously, but this case is*
15 *largely a credibility case for you, who you believe and who you*
16 *don't believe and I don't think I'm telling you anything new*
17 *here. You're going to find the facts and you're going to*
18 *decide who to believe and who not to believe. And once we get*
19 *those closing arguments done, you're going to start to*
20 *deliberate.")*

21 * * *

22 THE COURT: I don't know what else I could say, find
23 the facts, apply the law to the facts and decide the
24 credibility of the witnesses. Where did I go wrong?

25 MR. EDWARD BARTOLOMEI: Well, Your Honor, I believe

1 that based on the way it was presented, that it was an unfair
2 comment on the weight of the evidence.

3 THE COURT: Weight of the evidence?

4 MR. EDWARD BARTOLOMEI: It's a very simple case, Your
5 Honor, credibility, Your Honor, those particular issues.

6 THE COURT: I don't think that's the weight of the
7 evidence. Federal judges, by the way, are allowed to comment
8 on the weight of the evidence. I've never done it in my entire
9 career and I would never do it, but that is no comment on the
10 weight of the evidence. I didn't say the government's case,
11 you both presented witnesses.

12 MS. THOMPSON: You also didn't say it was a simple
13 case. You said it wasn't a complicated case.

14 MR. EDWARD BARTOLOMEI: I apologize.

15 THE COURT: You and I both know what a complex case
16 is, this is not a complex case, but I'll be more than happy
17 when they come back in to clarify this. And I've also
18 instructed them that nothing I say is to be construed by them
19 as any indication of what I believe the verdict should be. I
20 think I told them that also, not in this instance. It's in my
21 preliminary jury instructions.

22 MR. EDWARD BARTOLOMEI: And Your Honor, also the
23 statements that contain the difference between the router, the
24 laptop, the Wifi and technical data that you commented and
25 directed in the --

1 THE COURT: I was trying to explain to the lawyers
2 why -- I wasn't talking to the jury. I was talking to counsel.
3 I was explaining to the lawyers why it was a confusing
4 question.

5 MR. EDWARD BARTOLOMEI: Well, Your Honor, note our
6 objection for the record. I believe that at that point in
7 time, Your Honor, that was an issue to be determined by the
8 jury and, at this point in time, may have constituted again a
9 comment on the weight of the evidence and actually appears,
10 Your Honor, to be testimony from the bench regarding an issue
11 in fact.

12 MS. THOMPSON: I think the record should also reflect
13 that defense counsel misstated the evidence and
14 mischaracterized what the witness was saying and so the
15 government's perspective was the Court was stating facts, most
16 of which had already been testified to --

17 THE COURT: These are uncontested. Defense brought
18 out that there was -- here is the facts in this case that are
19 totally uncontested, that there was a password on the router
20 and there was no password on the laptop. And that is a
21 favorable, favorable set of facts for the defendant. It's
22 uncontested, totally uncontested in this case. Nobody is
23 contesting it. The government isn't going to get up and say
24 that computer had a password and only Mr. Michalik could get
25 into that computer. They're not going to say that. They

1 better not say it. And nobody is going to say that the network
2 wasn't password protected because Mr. Michalik said it was
3 password protected in his own testimony. So this is totally
4 uncontested. And if that's the best you can do on appeal, if
5 there is a need for an appeal, heaven forbid for the defendant.
6 I don't think that was a comment on the weight of the evidence.
7 Those are totally uncontested facts and I was trying to fit
8 those facts into the question that was being asked which was
9 very, very confusing. I know a little bit about computers,
10 just enough to be dangerous, I think.

11 MR. EDWARD BARTOLOMEI: Yes, sir.

12 THE COURT: And even I know that.

13 MR. EDWARD BARTOLOMEI: Our objection for the record,
14 Your Honor.

15 THE COURT: I don't know what the objection is, but
16 okay. I'll try to clear that up again. Remind me what these
17 two objections are.

18 COURTROOM DEPUTY CLERK: Yes.

19 THE COURT: Anything else?

20 MR. EDWARD BARTOLOMEI: At this point in time, Your
21 Honor -- anything else, Richard?

22 MR. RICHARD BARTOLOMEI: No.

23 MR. EDWARD BARTOLOMEI: We renew our request for
24 directed verdict.

25 THE COURT: I was going to remind you that you needed

1 to do that. Right, Priscilla?

2 COURTROOM DEPUTY CLERK: Yes.

3 MR. EDWARD BARTOLOMEI: We renew our request for
4 directed verdict of acquittal, Your Honor. We do not believe
5 that they've met the four elements necessary under the charges.
6 And specifically, Your Honor, once again interstate commerce
7 would be primary and knowledge would be the other, judge.

8 THE COURT: So again for the same reasons which I have
9 previously denied the earlier motion, I deny this motion.
10 There is sufficient evidence when you take into account the
11 government's purported confession by the defendant. That will
12 be for the jury to decide whether that was a confession or it
13 wasn't a confession, they've got to decide that. And all of
14 the other circumstantial evidence which the government has -- I
15 understand the defense contests that obviously and that will be
16 what the jury believes or doesn't believe. You know, I had a
17 big acquittal in this courtroom not that long ago in a big
18 case. That was -- what's the guy's name? Farthing. And the
19 lawyer was jumping around. I said I was absolutely fair in
20 this case. And then when we took a recess, I said, The jury is
21 out, but I think this guy is going to get acquitted because he
22 did get a fair trial. And guess what? He got acquitted. And
23 guess what? The lawyer said, you know what, Judge, I apologize
24 because you did give my client a fair trial.

25 I guess if he would have been convicted, I wouldn't

1 have given him a fair trial, but anyway, what can you say. You
2 got your objections on the record.

3 MR. EDWARD BARTOLOMEI: And thank you, Your Honor.

4 MR. RICHARD BARTOLOMEI: Thank you. Your Honor, one
5 other quick thing. If we were going to do a request for
6 reconsideration of the ruling of the motion to suppress, I'm
7 not sure that procedurally this would be the moment, but there
8 are two additional facts, but I think I can do that in some
9 kind of a post trial motion.

10 THE COURT: Yeah, that's a post trial motion I think.

11 MR. RICHARD BARTOLOMEI: Thank you.

12 THE COURT: And it would be -- I mean if the motion to
13 suppress was granted, this case would go away, so it would
14 actually be a post trial motion for judgment for verdict of
15 acquittal which you can make yet again, if you wish, and you
16 would just include that in your motion. I'll look at it
17 carefully, believe me. I don't have any brief for any party in
18 these cases except to make sure that the defendant gets a
19 constitutionally fair trial with the proper presumption of
20 innocence.

21 MR. EDWARD BARTOLOMEI: That would conclude the issues
22 from the defense, Your Honor.

23 THE COURT: Thank you.

24 MR. EDWARD BARTOLOMEI: And may I be seated?

25 THE COURT: Yes. You've already seen the

1 instructions, so we'll look at them now and try to settle them,
2 if we can. We'll take a brief recess.

3 COURT SECURITY OFFICER: All rise.

4 (10:24 a.m.)

5 * * *

6 (11:24 a.m.)

7 COURT SECURITY OFFICER: All rise.

8 THE COURT: The Court would note the presence of
9 counsel, the absence of the jury. I want to give you plenty of
10 time to have a chance to look at the proposed jury instructions
11 so we can proceed without further delay.

12 All right. Are you ready to go?

13 MS. THOMPSON: Yes, Your Honor.

14 MR. RICHARD BARTOLOMEI: Yes, Your Honor.

15 THE COURT: So here is what I do, the way I settle
16 these instructions and that is to read off the first few lines
17 and we start with the defense, you either say objection or no
18 objection. Now, I need both counsel, I always say this, I know
19 you know this already, but I need to say it on the record.
20 Just because you submitted an instruction to me or you had a
21 different instruction or you objected to a government
22 instruction or a defense instruction doesn't mean anything.
23 You have to object here or your objection is waived and that's
24 because many times lawyers will relook at instructions and
25 sometimes I've modified instructions and they will determine

1 that the instruction that I have is better for their client
2 than the one that they proposed or had objected to, so it makes
3 no sense to have a whole bunch of useless objections flying
4 around clouding up the record, so you need to object if you
5 think there is an objection you need to make and then I need to
6 make a ruling, okay. These are pretty fair instructions I
7 think. So I don't think we're going to have too difficult a
8 time.

9 All right, the first instruction is In any jury trial,
10 there are in effect two judges.

11 Somebody has to speak for you. You don't need to
12 stand up. This is the one time you can remain seated. Just
13 say either objection or no objection.

14 MR. EDWARD BARTOLOMEI: No objection, Your Honor.

15 MS. THOMPSON: No objection.

16 THE COURT: The next instruction, You as jurors are
17 the judges of the facts.

18 MR. EDWARD BARTOLOMEI: No objection, Your Honor.

19 MS. THOMPSON: No objection.

20 THE COURT: The next instruction was submitted by the
21 defendant and I've accepted it, The defendant has entered a
22 plea of not guilty to the charge in the indictment. A plea of
23 not guilty is a complete denial of the charges.

24 MS. THOMPSON: No objection.

25 MR. EDWARD BARTOLOMEI: Definitely no objection, Your

1 Honor.

2 THE COURT: Them first, you second, okay. Next
3 instruction is The indictment or formal charge against the
4 defendant is not evidence of guilt.

5 MR. EDWARD BARTOLOMEI: No objection, Your Honor.

6 MS. THOMPSON: No objection.

7 THE COURT: The next instruction is, As I told you
8 earlier, it is your duty to determine the facts.

9 MR. EDWARD BARTOLOMEI: No objection, Your Honor.

10 MS. THOMPSON: No objection.

11 THE COURT: The next instruction is, In considering
12 the evidence, you are permitted to draw such reasonable
13 inferences from the testimony, exhibits as you feel are
14 justified in the light of common experience.

15 MR. EDWARD BARTOLOMEI: No objection with the request
16 for clarification, Your Honor. Based on the motion prior to
17 the request for directed verdict, you indicated you were going
18 to address those two issues.

19 THE COURT: What issues?

20 MR. EDWARD BARTOLOMEI: The issue regarding the
21 computer, we talked about the tower. Will this be the curative
22 instruction as to anything you said from the bench?

23 THE COURT: I don't think that says anything about
24 that.

25 MR. EDWARD BARTOLOMEI: That's what I was saying.

1 THE COURT: This isn't it. I'm going to tell them
2 myself. I don't think I need a curative instruction, to be
3 honest with you, but I'm going to give one anyway.

4 MR. EDWARD BARTOLOMEI: Thank you, Your Honor.

5 MR. RICHARD BARTOLOMEI: Your Honor, I think that
6 comes later anyway, the instruction that talks about nothing I
7 have said was intended to --

8 THE COURT: Right, but I'm still going to give it
9 verbally.

10 MR. EDWARD BARTOLOMEI: Thank you, Judge. Then no
11 objection.

12 MS. THOMPSON: No objection from the government.

13 THE COURT: The next instruction is number seven, I
14 remind you that it is your job to decide whether the government
15 has proved the guilt of the defendant beyond a reasonable
16 doubt.

17 MR. EDWARD BARTOLOMEI: We have no objection with
18 that, Your Honor.

19 MS. THOMPSON: No objection from the government.

20 THE COURT: We're over to instruction number eight.
21 In determining whether any statement claimed to have been made
22 by the defendant outside of court and after the alleged crime
23 has been committed was knowingly and voluntarily made, you
24 should consider the evidence, consider such a statement with
25 great caution and great care.

1 MR. EDWARD BARTOLOMEI: No objection, Your Honor.

2 MS. THOMPSON: No objection.

3 THE COURT: The ninth jury instruction, During the
4 trial, you've heard testimony of certain expert witnesses.
5 There was only actually one. It should be, You heard testimony
6 of an expert witness.

7 MR. EDWARD BARTOLOMEI: Your Honor, we have an
8 objection. I noted that the language we requested in our
9 instruction would have been additional language, The testimony
10 and type of witness should be weighed the same as any other
11 witness, Your Honor.

12 THE COURT: No, that's not in this instruction.

13 MR. RICHARD BARTOLOMEI: Your Honor, I think what he's
14 referring to is ours had a little different language. Your
15 sentence was you should judge such testimony like any other
16 testimony. I think mine was a little more expanded. That's
17 what we were referring to. My language was, The testimony of
18 this type of witness should be weighed and its credibility
19 evaluated in the same way as that of any other witness.

20 THE COURT: Well, this is the general instruction that
21 we give in every jury trial, so I'm going to give this one. If
22 you want to lodge an objection, you can.

23 MR. RICHARD BARTOLOMEI: That would be our objection.
24 And that was our suggested language, but I see where yours
25 differs.

1 THE COURT: Well, it differs, but I don't think it's
2 less of an instruction. I think it accurately reflects Fifth
3 Circuit law. This is the Fifth Circuit pattern instruction and
4 I think it's been upheld many times.

5 MS. THOMPSON: Your Honor, the government has no
6 objection and we just note it's a difference without a
7 distinction.

8 THE COURT: Yes, okay. So with the change from expert
9 witnesses to an expert witness, we're going to give this one.

10 The defendant has proposed an instruction on character
11 evidence and I'm going to give that instruction even though I
12 think it's somewhat redundant, but I'm going to go ahead and
13 give it. And it starts where defendant is offered opinion
14 testimony concerning truth and veracity. I don't think you
15 have an objection to it, it's your instruction.

16 MR. EDWARD BARTOLOMEI: No objection.

17 THE COURT: Do you have an objection?

18 MS. THOMPSON: My only objection is with regard to
19 integrity or character as a law-abiding citizen. I don't
20 believe that was testified to, but I do think the witness
21 testified to his opinion regarding the defendant's truth and
22 veracity, so I would just ask that truth, veracity and honesty
23 and then remove the other language.

24 THE COURT: Well, I'm going to leave integrity in
25 because I believe he said that he thought he was a very great

1 guy, so that's kind of integrity, but you are right, there was
2 no specific question asked about law-abiding citizen.

3 MR. EDWARD BARTOLOMEI: Your Honor, I believe there
4 was testimony, but I believe the Court instructed our first
5 witness, Mr. Just, Your Honor, when he expanded on
6 truthfulness, he was honest, he had integrity. In that area
7 that came up and then the judge said we can't get into that and
8 then he said, well, he's truthful, Your Honor. He did mention
9 he was a person of --

10 THE COURT: I don't think so. I don't remember that.

11 MS. THOMPSON: I don't believe anything was elicited
12 regarding law-abiding citizen. With that removed, I have no
13 objection.

14 THE COURT: I don't remember ever telling somebody not
15 to testify whether they were a law-abiding citizen.

16 MR. EDWARD BARTOLOMEI: No, Your Honor, it was a
17 running response to the initial question.

18 THE COURT: I don't remember that, counsel, I'm sorry.
19 If I did, I would. If I did remember it, I would. I just
20 don't remember that.

21 MR. EDWARD BARTOLOMEI: Again, Your Honor, that's my
22 recollection.

23 THE COURT: Well, you might be right and I might be
24 wrong. I just don't remember that ever coming up. You want me
25 to see if I can have the reporter find it?

* * *

(Court reporter read back the record, August 28, 2019,
page 30, line 18 to page 31, line 9:

BY MR. EDWARD BARTOLOMEI:

Q. Now, you've known Jeffrey Michalik for how many years?

A. Probably about 14 years now.

Q. And during that period of time, have you had an opportunity to form an opinion concerning his veracity or truthfulness?

A. Yes.

Q. How would you characterize his veracity and truthfulness?

A. One thing I'd say about Jeff is --

THE COURT: No. One thing you would say is not the appropriate way to answer that question. You just need to answer how you would characterize him.

A. He's a good guy, honest guy, truthful. I mean I consider him a good guy.

Q. Well, the question, do you consider him to be truthful?

A. Yes.

MR. EDWARD BARTOLOMEI: Nothing further, Your Honor.
Thank you.)

* * *

MR. EDWARD BARTOLOMEI: Your Honor, we believe law-abiding is implicit since there was no evidence presented by the government to the contrary.

THE COURT: I think they have. That's what this whole

1 case is about.

2 MR. EDWARD BARTOLOMEI: Well, Your Honor, I would
3 separate the two since he -- we haven't determined that yet at
4 this point, Your Honor.

5 THE COURT: I understand that, but you said there's
6 been no evidence and they've presented evidence that he had
7 child pornography, so that's not lawful. I understand that
8 that's not been proven because that's for the jury to decide,
9 not me. I'm not going to put -- there was no testimony at all
10 about or character as a law-abiding citizen. There's been
11 testimony about his truth and veracity, honesty and I'm going
12 to give you integrity.

13 MR. EDWARD BARTOLOMEI: Thank you, Your Honor.

14 THE COURT: With that, other than your objection, is
15 any other problem with that instruction?

16 MR. EDWARD BARTOLOMEI: We have no other objection.
17 Thank you, Your Honor.

18 THE COURT: Any objection?

19 MS. THOMPSON: No, Your Honor.

20 THE COURT: Instruction number eleven is, The
21 testimony of witness may be discredited or impeached by showing
22 that the witness testified falsely or by evidence that at some
23 other time the witness said or did something or failed -- and
24 it goes on. Any objection to that instruction?

25 MR. EDWARD BARTOLOMEI: May I just look at ours for

1 one second, Your Honor?

2 THE COURT: Sure.

3 *(Pause.)*

4 MR. EDWARD BARTOLOMEI: No, Your Honor, we don't have
5 an objection.

6 MS. THOMPSON: No objection.

7 THE COURT: Now, I might add that the proposed --
8 looking back at the previous instruction, I didn't give your
9 proposed instruction because I gave a much broader instruction.
10 The one that you proposed says, You have heard testimony of --
11 that would have been Mr. Just. You also heard testimony from
12 others concerning the opinion about whether the witness is a
13 truthful person, the witness's reputation in the community,
14 where the witness lives, for telling the truth, it is up to you
15 to decide from what you heard here whether blank was telling
16 the truth at trial.

17 You didn't say anything about lawfulness.

18 MR. RICHARD BARTOLOMEI: It escaped my attention.

19 THE COURT: Well, you got a better instruction for you
20 than the one you proposed.

21 MR. RICHARD BARTOLOMEI: I'll take that. Thank you.

22 THE COURT: Instruction number 12, you will note that
23 the indictment charges that the offense was committed on or
24 about a specified date.

25 MR. RICHARD BARTOLOMEI: And that's part of the

1 confusion in this case. Where they are claiming things came in
2 and they -- first of all, there's a question regarding Amateur
3 Lover. The government has conceded through two witnesses that
4 Amateur Lover, they never found anything on the computer, so of
5 course the question becomes why they need to put in these
6 pictures, but the other aspect of it is it's on a specific --

7 THE COURT: I think he identified two pictures, isn't
8 that the one where he identified two pictures? That's why they
9 get to put it in because he identified them as pictures,
10 according to the government, that he saw. That's why they get
11 to put it in, or he had viewed on the computer. But let's go
12 on. We're settling instructions. Let's not argue about
13 evidence here.

14 It said "crimes". It's "crime".

15 MS. THOMPSON: There's also the rest of that sentence
16 says "near the dates stated in the indictment" and there's only
17 one date.

18 THE COURT: Yes, the indictment sets out the number of
19 dates. This is the general --

20 MR. RICHARD BARTOLOMEI: I understand.

21 THE COURT: This is not some special instruction for
22 this case. This is general federal law.

23 MR. RICHARD BARTOLOMEI: Well, I'm arguing for the
24 exception, but you understand what I'm saying is that where
25 they have elected to plead and indict under 12 and, of course,

1 the young ladies that are shown in five are clearly not under
2 12.

3 THE COURT: Which one? Five?

4 MR. RICHARD BARTOLOMEI: The two images of the girls
5 that he apparently was supposed to have --

6 MS. THOMPSON: It is not clear that those two images
7 do not depict children under the age of 12.

8 THE COURT: That will be for the jury to decide
9 whether they are under 12, not for me to decide. If I try to
10 decide they were under 12, I'd become the jury. I've tried
11 these cases without a jury, but not in this case. That's for
12 them to decide, not me or the government for that matter.

13 MR. RICHARD BARTOLOMEI: We were looking for a
14 specific date because the computer seized on that date --

15 THE COURT: This has nothing to do with that. The
16 government only has to prove on or about a certain date that he
17 possessed child pornography, doesn't have to be a certain date.
18 Now, you can certainly argue that the government said he did it
19 at this time and it's clear that he -- I know you're going to
20 argue that he wasn't around. That was that whole can it be
21 downloaded at a certain time. And she's going to argue that he
22 doesn't have to be present for this stuff to be downloading.
23 Fine, that's an argument you are certainly and absolutely
24 entitled to make, but that has nothing to do with this.

25 MR. RICHARD BARTOLOMEI: I appreciate it, Your Honor.

1 I simply lodged our objection. I believe it should be on a
2 specific date.

3 THE COURT: Do you think he has any merit to that
4 argument?

5 MS. THOMPSON: No.

6 THE COURT: Well, you know, it's in the government's
7 interest, if they think they've got a strong case and they're
8 going to get a conviction, they don't want me to give an
9 instruction that's error, I would hope.

10 Look, I had a huge fight with an AUSA in Honolulu,
11 good friend of mine actually, and I would not let evidence in.
12 Actually it was a terrible case. It was a case involving a
13 rape and molestation by a hospital employee at Tripler Army
14 Medical Center of women in the ICU, if you can imagine such a
15 thing, and I refused to let him have an instruction that he
16 wanted and I refused to let certain evidence in and he was
17 furious. Well, the defendant was convicted and a week later,
18 the Ninth Circuit came down with a decision reversing another
19 conviction where that very evidence came in. So it's not in
20 the government's interest to have evidence come in that's going
21 to cause a reversal for many reasons. The government is
22 supposed to be here trying to do justice, not to get a
23 conviction. So now, where they believe that justice is done
24 with a conviction, that's fine. That's what we're talking
25 about here, but not to try to sneak some instruction in. But I

1 believe that this is still a credible instruction because there
2 are many dates where he's proffered to have done that. And if
3 the suggestion is that, you know, the jury finds, well, he
4 didn't download pornography on June 8th, but he actually
5 downloaded it -- I'm using hypothetical dates -- June 9th and
6 we find beyond a reasonable doubt that he did that, he can be
7 convicted even though the indictment might say June 8th. That
8 doesn't mean that you can't argue that they said it happened on
9 June 8th and it could not have possibly happened on June 9th,
10 then they wouldn't find that it happened on June 9th. You see?
11 So that's why that argument is somewhat fallacious.

12 MR. RICHARD BARTOLOMEI: The only thing is it's going
13 to tie in with your next instruction, so I might --

14 THE COURT: We'll talk about that one. Instruction
15 number 13, You are here to decide whether the government has
16 proved beyond a reasonable doubt that the defendant is guilty
17 of the crime charged. The defendant is not on trial for any
18 act, conduct or offense not alleged in the indictment. Neither
19 are you called upon to return a verdict as to the guilt of any
20 other person or persons not on trial as a defendant in this
21 case except as you were otherwise instructed.

22 And I'm not otherwise instructing them, so that is our
23 standard instruction. I don't know what's wrong with that
24 instruction. That's a defense centric instruction. I mean we
25 don't want them to find him guilty because they determine on

1 their own that Mr. Smith, Dave Smith downloaded child
2 pornography.

3 MR. RICHARD BARTOLOMEI: Well, so I could address
4 that.

5 THE COURT: There's been no evidence of that.

6 MR. RICHARD BARTOLOMEI: There's been no evidence that
7 we're allowed to get into, but anyway.

8 THE COURT: I don't think there's been any evidence of
9 it at all. Go ahead.

10 MR. RICHARD BARTOLOMEI: The indictment -- they do
11 have a specific date. And the other thing that's interesting
12 about of course is --

13 THE COURT: They always have a specific date. That's
14 in every indictment.

15 MR. RICHARD BARTOLOMEI: Finishing the other part I
16 was moving to --

17 THE COURT: Okay.

18 MR. RICHARD BARTOLOMEI: Or the minor had not attained
19 12 years of age. Now, with reference to that, that's a
20 specific subset of the indictment that they have elected to
21 charge and that, because again I point out to the images which
22 there is no evidence he ever possessed and the government --
23 several witnesses have acknowledged are not on the computer, so
24 therefore, they have no relevance in that sense. They don't
25 show they're under 12 --

1 THE COURT: What does that have to do with this
2 instruction?

3 MR. RICHARD BARTOLOMEI: The defendant is not on trial
4 for any act, conduct or offense not alleged in the indictment.

5 THE COURT: Right.

6 MR. RICHARD BARTOLOMEI: So -- well, all right. Let
7 me skip to the end sentence. Except as you are otherwise
8 instructed, I believe would be superfluous because it says
9 guilt of any other person or persons not on trial as a
10 defendant in this case.

11 THE COURT: Yeah, I would agree with you. We don't
12 need to have that in there. That's just standard language.

13 MR. RICHARD BARTOLOMEI: And I understand, Judge, I
14 do.

15 THE COURT: So we'll take that out. I agree with you.
16 That's fine.

17 MS. THOMPSON: No objection.

18 THE COURT: Instruction number 14. If the defendant
19 is found guilty, it will be my duty to decide what the
20 punishment will be. You should not be concerned with
21 punishment in any way. It should not enter your consideration
22 or discussion.

23 MR. EDWARD BARTOLOMEI: No objection, Your Honor.

24 MS. THOMPSON: No objection.

25 THE COURT: Instruction number 15. Title 18 U.S. Code

1 2252A(a) (5) (B). This is the standard Fifth Circuit instruction
2 on this.

3 MR. EDWARD BARTOLOMEI: One brief moment, Your Honor.

4 THE COURT: Sure.

5 *(Pause.)*

6 And I've added in, by the way, something that you
7 asked me to add in, the defense asked to be added in, I've
8 added in, even though I don't have to, I've done it anyway,
9 which is two paragraphs, If you find the government has proved
10 all these elements beyond a reasonable doubt, the defendant is
11 guilty of the crime of possession. If you find the government
12 has not, has failed to prove -- and then you had a typo, but
13 I've added "not guilty". Those two paragraphs.

14 MR. RICHARD BARTOLOMEI: I remember the typo.

15 THE COURT: I've added those two paragraphs that
16 you've requested even though technically I'm not required to do
17 so, so this is as modified by you. So I assume you don't have
18 any objection to it.

19 MR. RICHARD BARTOLOMEI: No.

20 THE COURT: Do you have any objection?

21 MS. THOMPSON: No, Your Honor.

22 MR. RICHARD BARTOLOMEI: Have we gone to 15?

23 THE COURT: This was 15.

24 MR. RICHARD BARTOLOMEI: That's what I'm saying, we're
25 at 15.

1 THE COURT: Yes. You have no objection to 15, so
2 let's go to --

3 MR. RICHARD BARTOLOMEI: I just wanted to point out,
4 we're not going to get an instruction about he had to know it
5 moved in interstate commerce, that's not --

6 THE COURT: You are not getting an instruction because
7 that isn't the law. Do you have any law that shows me -- if
8 you can show me a case that says that in order to be convicted
9 of this crime, he had to know that it moved in interstate
10 commerce, I'd give that instruction in a heartbeat, but there
11 isn't such a case. It's no different than firearms.

12 MR. RICHARD BARTOLOMEI: Well, the only reason I
13 mention that, there's a case U.S. v. Colavita (*ph*), I believe
14 it's out of the Ninth Circuit where -- and you probably
15 remember the case because the interesting thing about it is
16 they seemed to suggest that you do have to have knowledge that
17 it moves in interstate commerce, except the guy pled guilty, so
18 they said it's not a problem because he entered a plea.

19 THE COURT: If the Ninth Circuit would have said that,
20 they would have been reversed by the Supreme Court. This is no
21 different than firearms. I wrote an opinion on the firearms
22 for the Ninth Circuit involving the question of if you go in
23 today to buy a firearm at one of the stores that still sells
24 them, some of them don't anymore, but if you went in to buy a
25 firearm and you were a felon, okay, and you bought that firearm

1 and you went home and you got caught with it, it is not a
2 defense that you didn't know that that firearm traveled in
3 interstate commerce. They have to prove that it traveled in
4 interstate commerce, but it isn't a defense that he didn't know
5 that it traveled in interstate commerce. It's not even a
6 defense that he thought it was made in Texas. That wouldn't be
7 a defense either. They do make guns in Texas, but if he bought
8 a Smith and Wesson, it probably wasn't made in Texas, probably
9 made in Hartford, Connecticut.

10 MR. RICHARD BARTOLOMEI: I've learned one thing -- you
11 know, with all the debate about assault rifles, my assistant is
12 married to a detective who does the instruction. He walked out
13 with a blank AR receiver which is the guts of the gun. He
14 says, Look at this. I said, okay. He says, Do you see an ID?
15 No. You see that top? He says, All you have to do is cut it
16 out and you can make this gun a 50 caliber, 30 caliber and
17 there's no tracing --

18 THE COURT: You can also turn an AR15 into an M16
19 without much difficulty either. They do it in Mexico all the
20 time.

21 You haven't cited me any case that says that he has to
22 know that it traveled -- other than this case that doesn't
23 stand for that proposition.

24 MR. RICHARD BARTOLOMEI: The only case I found was
25 U.S. versus Colavita (*ph*) and that was I believe out of the

1 Ninth Circuit, but I pointed out they said, well, yeah, that
2 would seem to appear that he has to know that, but then they
3 said but he pled guilty, so what difference does it make.

4 THE COURT: Well, I don't know who these judges were,
5 but it would be dicta anyway and it's just a wrong statement of
6 the law.

7 MR. RICHARD BARTOLOMEI: I didn't want to mislead the
8 Court. I thought it was dicta too, but that was the only
9 authority I found specifically on point.

10 THE COURT: I've never even had anybody raise that
11 argument. They don't have to know. So that's your objection.

12 MR. EDWARD BARTOLOMEI: Your Honor, one point to that,
13 just for the record, the difference between a gun case and a
14 pornography case, Your Honor, I think are significant
15 especially based on the status of this record because in a gun
16 case the establishment of the manufacturer is generally and
17 clearly identified and known to be out of the state or out of a
18 particular location and that would be the distinction.

19 THE COURT: We did have, however, testimony, they have
20 to prove that and we did have testimony from the agent about
21 the fact that these images were on the Internet and were from
22 other locations. There was one testimony about one set of
23 images that were produced in Austin, but they also went up on
24 the Internet, I think.

25 MS. THOMPSON: Correct, Special Agent Sean Mullen

1 identified five children, three different series and testified
2 that all of them had traveled in interstate commerce.

3 THE COURT: Because he's found them everywhere.

4 MS. THOMPSON: Correct.

5 MR. RICHARD BARTOLOMEI: There's two other parts of
6 this instruction, if I may.

7 MR. EDWARD BARTOLOMEI: As to that issue, I'll be
8 seated.

9 THE COURT: You can't both talk at once.

10 MR. RICHARD BARTOLOMEI: Page 19, very top of the
11 page, do they get an instruction on constructive possession? I
12 don't believe they do. And that would mean all reference to
13 constructive possession would come out. And the other one is
14 you have at the top of 20, the term minor means any person
15 under the age of 18.

16 THE COURT: Where are you?

17 MR. RICHARD BARTOLOMEI: Top of page 19, directly or
18 through another person or persons is in constructive
19 possession. I don't think they should get an instruction on
20 this case regarding constructive possession. They haven't
21 demonstrated anything like that. Top of page 19.

22 THE COURT: I'm there.

23 MS. THOMPSON: Your Honor, the facts in this case
24 support this instruction. The defense put in that other people
25 had access to the laptop, so the instruction is appropriate

1 with regard to whether possession may be sole or joint. There
2 was also only one user account on the computer, so everybody --
3 anybody who used it would use that one account. With regard to
4 the term "minor", that's part of the statute and defined in the
5 statute.

6 THE COURT: So I understand your objection, I'm going
7 to overrule the objection, counsel, so your objection is there.

8 MR. RICHARD BARTOLOMEI: Okay, but the "minor" part is
9 under 18 when they're only charged with under 12.

10 THE COURT: If you're under 12, you're certainly under
11 18.

12 MR. RICHARD BARTOLOMEI: Yes.

13 THE COURT: By my calculation.

14 MR. RICHARD BARTOLOMEI: Yes, but it actually
15 instructs the opposite which is you can go up to 18 instead of
16 under 12, which means you can go outside the scope --

17 THE COURT: I don't think that's right, but anyway go
18 ahead.

19 MS. THOMPSON: That is not correct at all and your
20 second element specifically says the child pornography involved
21 a prepubescent minor or a minor that had not yet attained the
22 age of 12 years. The definition is just explaining what minor
23 means. The element that has to be proven specifically states
24 it has to be prepubescent or under 12. They are not
25 inconsistent at all and not misleading.

1 MR. RICHARD BARTOLOMEI: Your Honor, what I'm saying
2 is it's like a Venn Diagram.

3 THE COURT: Where are we?

4 MR. RICHARD BARTOLOMEI: Top of page 20. It's like a
5 Venn Diagram. They've indicted under 12, so it's a small
6 circle in the large circle of the statute, so they're limited
7 to the small circle. They're limited to --

8 THE COURT: Wouldn't it be easier -- your case rests
9 on under 12. That's what you charged him with, right?

10 MS. THOMPSON: Yes.

11 THE COURT: Wouldn't it be easier if we say for
12 purposes of this case, minor means any person under the age of
13 12.

14 MS. THOMPSON: I think that's a misstatement. I think
15 minor --

16 THE COURT: I said for purposes of this case. It
17 would generally be a misstatement, of course.

18 MS. THOMPSON: I don't think that clarification is
19 necessary. Everywhere that we talk about the element that has
20 to be proven, it specifies prepubescent minor. It tells you
21 what kind of minor. A minor is anybody under the age of 18.
22 The definition of minor has nothing to do with the elements
23 that the government has to prove beyond a reasonable doubt.

24 THE COURT: I know, but so what's the harm?

25 MS. THOMPSON: I think that could be problematic --

1 THE COURT: Why?

2 MS. THOMPSON: -- later because you're changing the
3 definition of minor and that is a general definition.

4 THE COURT: Later? What do you mean later? There is
5 no later. This case.

6 MS. THOMPSON: Well, if he were to be convicted and
7 this goes up on appeal, the Court has changed the definition of
8 minor. You could take out that sentence, although I think
9 minor as a pretty --

10 THE COURT: Actually we talk about the specifics --
11 let's just remove that sentence because we talk about the
12 elements. There's no need to have it there, it's redundant in
13 a way. Because it's, First the defendant knowingly possessed
14 an item that contains an image of child pornography as alleged
15 in the indictment, second, the child pornography of
16 prepubescent minor or a minor that had not yet attained the age
17 of 12. It's there, we don't need to have it anyplace else.

18 MS. THOMPSON: I do not object to the sentence being
19 removed.

20 THE COURT: Let's just remove the sentence. It's
21 redundant and we don't need it. Let's just take it out, The
22 term "minor" means any person under the age of 18. We're just
23 going to remove that.

24 Usually we get these indictments and there's a couple
25 of counts and one count is just the child pornography, which

1 would mean anybody up to 17 --

2 MS. THOMPSON: Eighteen.

3 THE COURT: That's right, 18. Then we would get a
4 specific other count because they had both. They have these
5 16-year-olds and then they have the five year-olds. Okay.
6 We're over to page 22 on number 16.

7 MR. EDWARD BARTOLOMEI: Your Honor, I object to page
8 23, the conclusion of 22, Your Honor.

9 THE COURT: What? Where are we?

10 MR. EDWARD BARTOLOMEI: The instruction carries over
11 to page 22, Your Honor, and our objection addresses 23, page
12 23.

13 THE COURT: Right. What do you object on page 23?

14 MR. EDWARD BARTOLOMEI: I believe, Your Honor, the
15 bold acclamation as a matter of law constitutes an unfair
16 comment on the weight of the evidence.

17 THE COURT: What is that? What are you reading? Give
18 me some specific.

19 MR. EDWARD BARTOLOMEI: The last sentence, I instruct
20 you, in bold type.

21 THE COURT: I bold it so we could discuss it. Now, do
22 we have any law that says one way or the other about visual
23 depictions that have traveled -- moved in interstate or foreign
24 commerce?

25 MS. THOMPSON: Yes, there is a body of law that holds

1 that, in fact, U.S. v. Winkler from the Fifth Circuit is one of
2 them that came from Judge Rodriguez's courtroom, that visual
3 depictions that have traveled on the Internet have moved in
4 interstate and foreign commerce. I do not have a problem
5 taking that sentence out, though, because I think it's already
6 stated in there, that on page 22 where you say, The Internet is
7 considered a facility or means of interstate commerce. I think
8 that's highlighting that part.

9 THE COURT: So this is actually I believe -- my
10 recollection is this is a correct statement of the law, so
11 you're saying it isn't. Do you have a case that says it isn't?
12 Mr. Bartolomei, do you have a case that states?

13 MR. EDWARD BARTOLOMEI: I have Winkler here.

14 THE COURT: Why don't you review it. Take a minute.

15 MR. EDWARD BARTOLOMEI: Thank you, Your Honor.

16 *(Pause.)*

17 MS. THOMPSON: Your Honor, I do believe it's a correct
18 statement of the law, but I do not have a problem removing that
19 last sentence.

20 MR. EDWARD BARTOLOMEI: We don't object if they don't
21 object.

22 THE COURT: Well, the problem is -- who is going to
23 make the closing argument?

24 MR. EDWARD BARTOLOMEI: We'll split time.

25 THE COURT: Okay. So the problem is if somebody gets

1 up and says, They have to prove beyond a reasonable doubt that
2 the article -- not just that the article transferred, was on
3 the Internet, but that this specific article traveled in
4 interstate commerce.

5 And that's going to be a problem because you're going
6 to jump up and object and say, Wait a minute, the fact that
7 it's on the Internet is as a matter of law interstate commerce.
8 So you see what I'm saying? We can't have that. I need to
9 know one way or the other. Just look at Winkler. That's the
10 Fifth Circuit case and that's the one that counts.

11 MR. EDWARD BARTOLOMEI: Yes, sir.

12 *(Pause.)*

13 THE COURT: Do you have that case, Tracy?

14 MS. THOMPSON: No, not with me. I tried that case.
15 That's how I remember.

16 THE COURT: This is obviously an argument that
17 somebody else made that, according to Ms. Thompson, didn't go
18 anywhere.

19 MR. RICHARD BARTOLOMEI: The other thing, if I may
20 point out, because I have discussed it with Ed Bartolomei, it
21 seems to say more than an instruction of the law, it reads as
22 if it is already determined. They still have to prove it, but
23 it reads as if it's already determined and they don't have to
24 consider that. So that's the only other question we had
25 amongst ourselves. But pointing out if we strike that, then we

1 don't have an objection.

2 THE COURT: Just a minute.

3 *(Pause.)*

4 Yes, Winkler clearly states without equivocation that
5 in U.S. versus Runyon which is a Fifth Circuit case also,
6 affirming a conviction where the government adduced adequate
7 circumstantial evidence to tie particular images of child
8 pornography to the Internet, therefore, the evidence at trial
9 is sufficient to support Winkler's conviction on count five.
10 That's it.

11 MR. EDWARD BARTOLOMEI: That's a sufficiency issue,
12 it's not necessarily a matter of law that it's in interstate
13 commerce.

14 THE COURT: But Winkler's argument was that just
15 because it was on the Internet the government had to prove
16 more. And the Fifth Circuit said no, they just needed to tie
17 the images to the Internet through direct or circumstantial
18 evidence.

19 MR. EDWARD BARTOLOMEI: Well, it's redundant, number
20 one, Your Honor, because I think it's discussed earlier in the
21 instruction, and secondly, more importantly, the way it's
22 manifested and presented in bold type --

23 THE COURT: No, it wouldn't be in bold type. It was
24 only in bold type because I wanted to draw it to your
25 attention, in fairness, I didn't want to just breeze past it.

1 No good deed goes unpunished, right?

2 MR. EDWARD BARTOLOMEI: No, Your Honor, many times
3 good deeds are blessed.

4 MS. THOMPSON: Perhaps it would alleviate their
5 concern if you took out the beginning of that sentence and just
6 started with visual depictions that have traveled on the
7 Internet have moved in interstate and foreign commerce. And
8 therefore, you're not telling them that you're instructing them
9 as a matter of law, although you really are. But it doesn't
10 highlight that.

11 THE COURT: Is that better for you?

12 MR. EDWARD BARTOLOMEI: I don't think so, Your Honor.

13 THE COURT: Do we have the actual Winkler case?

14 MR. EDWARD BARTOLOMEI: I have it, Judge, right here.
15 May I approach?

16 THE COURT: You certainly may.

17 MR. EDWARD BARTOLOMEI: I give it to you highlighted.

18 *(Pause.)*

19 THE COURT: He argued that it couldn't be sustained
20 because the images were found on his temporary storage on his
21 computer rather than -- I don't know what he did.

22 MS. THOMPSON: There were a variety of computers in
23 that case. And on one of the computers the files were found in
24 a temporary cache folder.

25 THE COURT: That you can clean, but he apparently

1 didn't clean it.

2 MS. THOMPSON: Correct. Those files were linked to a
3 website that he paid for access to.

4 (Pause.)

5 THE COURT: They're talking about at the Eighth
6 Circuit case which reversed a child pornography conviction
7 where the government could only show that the defendant had in
8 his temporary cache some pictures which were automatically
9 downloaded to that temporary cache and it could have been that
10 the defendant clicked on an adult pornography site, some child
11 pornography popped up on his computer and he goes, Oh, my God,
12 and got out of there immediately and it would have been stored
13 anyway. So I certainly agree with that and the government at
14 least in this district has never prosecuted a temporary cache
15 child pornography case that I'm aware of. But that's not our
16 issue here because these were actually on the hard drive.
17 These weren't temporary cache cases.

18 (Pause.)

19 It says, Prosecutors, judges and juries have a duty to
20 safeguard as best they are able potential defendants when
21 receipt of child pornography might well have been truly
22 inadvertent.

23 Something I've said time and time again. However, in
24 this case it showed that the defendant -- I mean the evidence
25 was that the child pornography was downloaded.

1 (Pause.)

2 It says, One cannot be guilty of possession of child
3 pornography for simply having viewed an image on a website
4 thereby causing the image to be automatically stored in the
5 browser cache. And I don't think you've ever prosecuted a case
6 like that, have you? No. There's enough of the other ones to
7 prosecute.

8 (Pause.)

9 This is so interesting. This almost mirrors our case
10 perfectly. It says, Winkler makes a series of arguments
11 disputing the proof the government adduced showing that he
12 downloaded the files at issue in count five. He relies on a
13 Wal-Mart store receipt showing that he purchased several items
14 with his credit card at 10:52 p.m. on December 21st, 2004. He
15 argues that because the government's evidence showed the illicit
16 files in question were downloaded at 10:53 p.m. on the same
17 day, it would be impossible for him to be the person at the
18 computer downloading the files at the time. And he claims that
19 there were virus problems on that computer several years ago
20 and he had not changed his password in 12 to 15 years. He also
21 argues that the government failed to show that there had been
22 an after-hours opening of the office and so forth. That's
23 really almost on all fours.

24 (Pause.)

25 Winkler also argues that his conviction on count five

1 should be reversed because the government offered no evidence
2 to show that any of the files alleged in count five had ever
3 traveled on the Internet or had otherwise moved in interstate
4 commerce, and thus, the government failed to prove the
5 jurisdictional element of the crime. Winkler is incorrect.
6 Evidence at trial established that zip files in that case
7 housing the individual videos at issue in the count were
8 obtained from a website. Evidence at trial further
9 demonstrated the files at issue in count five were extracted
10 from those zip files onto Winkler's hard drive, and thus, that
11 the files came to Winkler's computer from the Internet. See
12 United States versus Runyon affirming conviction where the
13 government adduced adequate circumstantial evidence to tie
14 particular images of child pornography to the Internet.
15 Therefore, the evidence at trial was sufficient to support
16 Winkler's conviction on count five. That's it.

17 But you're willing to do what now? Remove that
18 sentence entirely? I don't think we really need it anyway.

19 MS. THOMPSON: Correct. And as the Court stated, as
20 long as defense counsel is not going to argue something to the
21 contrary --

22 THE COURT: You cannot get up there and argue that
23 just because they showed it was on the Internet, that isn't
24 interstate commerce. Because that's not the law. You can
25 certainly argue that if you believe they haven't showed that

1 they came from the Internet, if that's --

2 MR. RICHARD BARTOLOMEI: That's part of the two
3 charged downloads. The evidence is pretty clear that didn't
4 come from the Internet.

5 MS. THOMPSON: That's not the evidence. We don't know
6 where they came from, could have been the Internet, could have
7 been a thumb drive.

8 THE COURT: But the thumb drive would have had to come
9 from the Internet, right? Unless he admits that he or somebody
10 else that he knows who had access to the computer produced that
11 child pornography. We've already got evidence that they
12 came -- the government has evidence that this pornography was
13 on the Internet. That's where this pornography came from. And
14 they can argue that and you can argue otherwise and it will be
15 for the jury to decide.

16 MR. RICHARD BARTOLOMEI: Agent Nutt, if you remember,
17 I pressed, Yeah, probably.

18 THE COURT: All I'm saying is you cannot argue as a
19 matter of law that if it was on the Internet, then that is not
20 proof that it traveled in interstate commerce, because you know
21 that.

22 MR. RICHARD BARTOLOMEI: That part, I got.

23 THE COURT: Let's get to the next one. The term
24 "knowingly" as that term has been used from time to time which
25 means an act done voluntarily and intentionally and not because

1 of mistake or accident.

2 (Pause.)

3 Is this a hard one?

4 MR. EDWARD BARTOLOMEI: Sorry, Judge, no.

5 MR. RICHARD BARTOLOMEI: No objection.

6 MS. THOMPSON: No objection.

7 THE COURT: The next one is Guilty knowledge may not
8 be inferred solely from ownership or access to a computer where
9 the government claims possession of images of claimed child
10 pornography on a computer, the government must prove the
11 defendant had actual knowledge that there was child pornography
12 on the computer on the specific date of the offense.

13 MR. EDWARD BARTOLOMEI: No objection.

14 THE COURT: It really should be "on or about the
15 specific date of the offense".

16 MS. THOMPSON: Yes, or just end it with child
17 pornography on the computer.

18 THE COURT: I don't know where "the specific date of
19 the offense" comes from because that isn't -- whose instruction
20 is this?

21 MS. THOMPSON: This is the defense.

22 THE COURT: That's not right.

23 MS. THOMPSON: And I think the case law supports the
24 concept. I'm not aware of any court actually giving this as an
25 instruction, but I don't object with the change on that very

1 last sentence.

2 THE COURT: See, Mr. Bartolomei is getting me to give
3 all these defense instructions that nobody has ever given
4 before.

5 MR. EDWARD BARTOLOMEI: Thank you.

6 THE COURT: So with that change, I'm going to give the
7 instruction. I'm going to remove "on the specific date of the
8 offense" because they don't have to prove a specific date.

9 MR. EDWARD BARTOLOMEI: No objection, Your Honor, as
10 to 26.

11 THE COURT: To reach a verdict, whether it is guilty
12 or not guilty, all of you must agree.

13 MR. EDWARD BARTOLOMEI: No objection, Judge.

14 MS. THOMPSON: No objection.

15 THE COURT: And okay, that's it. One of the
16 instructions I say, Also do not assume from anything I may have
17 said or done during the trial that I have any opinion on any of
18 the issues in this case. Except for the instructions to you on
19 the law, you should disregard anything I may have said during
20 the trial at arriving at your own verdict.

21 MR. RICHARD BARTOLOMEI: I knew that that was in, when
22 we were discussing it earlier, I knew you had that instruction.

23 THE COURT: I'm still going to give a specific
24 instruction. Okay. She's got to make those changes. You
25 should have lunch now. The verdict form is just a simple

1 verdict form. It just says, We the jury in the above-captioned
2 case unanimously return the following verdicts. As to count
3 one of the indictment, possession of child pornography, we, the
4 jury, unanimously find the defendant, Jeffrey Clinton Michalik
5 either guilty or not guilty. And they strike one of the boxes.
6 Any objection to the verdict form? This is not an
7 interrogatory verdict.

8 MS. THOMPSON: There is no objection by the
9 government.

10 THE COURT: This is a standard verdict form we use in
11 these cases.

12 *(Pause.)*

13 MR. EDWARD BARTOLOMEI: Your Honor, as to the specific
14 age, Your Honor, to the age of 18 or under or are we at 12
15 because in that case you would have to find that it was child
16 pornography containing a child 12 years or younger.

17 THE COURT: Possession of child pornography.

18 MS. THOMPSON: He's only charged with the prepubescent
19 charge. That's one of the elements.

20 THE COURT: That's all he's charged with. We don't
21 have to put that on the verdict form.

22 MR. EDWARD BARTOLOMEI: All right.

23 THE COURT: So the verdict form is okay. Okay, we can
24 go off the record.

25 *(12:30 p.m., lunch recess.)*

1 * * *

2 (1:56 p.m.)

3 COURT SECURITY OFFICER: All rise.

4 THE COURT: Please be seated. Mr. Bartolomei, what
5 would you like?

6 MR. EDWARD BARTOLOMEI: Yes, Your Honor, Priscilla was
7 gracious enough to tell me about the general instruction at the
8 opening regarding use of the notes. And I've had instructions
9 given generally from the bench that when they take their notes
10 back there, they're personal notes.

11 THE COURT: Right, not to be shared. I will remind
12 them of that.

13 MR. EDWARD BARTOLOMEI: Thank you very much.

14 * * *

15 COURT SECURITY OFFICER: All rise for the jury.

16 THE COURT: The Court would note the presence of the
17 ladies and gentlemen of the jury, all counsel, as well as, of
18 course, the parties, the defendant and the government's case
19 agent.

20 A couple of things, ladies and gentlemen, I want to
21 remind you of. First of all, because there was an interaction
22 between myself and counsel during examination, you need to
23 remember that nothing which I say, nothing which I say is
24 evidence in this case and certainly is not intended in any way
25 to suggest to you what the evidence is. You are the sole

1 finders of fact -- I can't see all of you here.

2 You are the sole finders of fact here and nothing that
3 I say is testimony or is a comment on the evidence, you should
4 always remember that. And secondly, you know, when I said to
5 you that this is not a complex case, well, it really isn't a
6 complex case. When I talk about complex case, I'm talking
7 about the case that involves six or seven defendants or lasts
8 two to three months or has 25 to 30,000 documents. It was not
9 intended by me to suggest to you this wasn't an important case.
10 You know that I think that this is an important case to both
11 the government and the defendant and you are the finders of
12 fact and you will take the facts, you will find them and then
13 you will take the law as I instruct you in just a moment and
14 then you will reach your verdict on that basis. You are the
15 sole finders of fact, nobody else, so you just need to remember
16 that. I always remind the jury about that.

17 I also will remind you that the notes that you have
18 taken during the evidentiary phase of this case are for your
19 use only and they're not to be shared with other members of the
20 jury, okay. All right. Okay.

21 Now, it's my job to instruct you on the law. That's
22 my constitutional duty. You don't take notes because you don't
23 need to take notes because I will send in a couple of copies of
24 the jury instructions with you. Okay. And you'd have to be a
25 real good note taker to take notes anyway. My law clerk, my

1 career law clerk, Laura Cauley, is going to read the jury
2 instructions to you as a favor to me because my voice just
3 won't work this weekend if I try to read them and with the
4 concurrence of the parties. But it's my instructions. She's
5 just reading them for me, okay. Laura, are you ready?

6 MS. CAULEY: Yes. Members of the jury, in any jury
7 trial there are in effect two judges. I am one of the judges,
8 the other is the jury. It is my duty to preside over the trial
9 and to decide what evidence is proper for your consideration.
10 It is also my duty at the end of the trial to explain to you
11 the rules of law that you must follow in applying and arriving
12 at your verdict. First I will give you some general
13 instructions which apply in every case. For example,
14 instructions about burden of proof and how to judge the
15 believability of witnesses. Then I will give you some specific
16 rules of law about this particular case. And finally, I will
17 explain to you the procedures you should follow in your
18 deliberations. You as jurors are the judges of the facts, but
19 in determining what actually happened, that is in reaching your
20 decision as to the facts, it is your sworn duty to follow all
21 of the rules of law as I explain them to you. You have no
22 right to disregard or give special attention to any one
23 instruction or to question the wisdom or correctness of any
24 rule I may state to you. You must not substitute or follow
25 your own notion or opinion as to what the law is or ought to

1 be. It is your duty to apply the law as I explain it to you
2 regardless of the consequences. It is also your duty to base
3 your verdict solely upon the evidence without prejudice or
4 sympathy. That was the promise you made in the oath you took
5 before being accepted by the parties as jurors and they have
6 the right to expect nothing less.

7 The defendant has entered a plea of not guilty to the
8 charge in the indictment. The plea of not guilty is a complete
9 denial of the charges.

10 The indictment or formal charge against the defendant
11 is not evidence of guilt. Indeed the defendant is presumed by
12 the law to be innocent. The defendant begins with a clean
13 slate. The law does not require a defendant to prove his
14 innocence. The government has the burden of proving a
15 defendant guilty beyond a reasonable doubt. And if it fails to
16 do so, you must acquit the defendant. While the government's
17 burden of proof is a strict or heavy burden, it is not
18 necessary that the defendant's guilt be proof beyond all
19 possible doubt. It is only required that the government's
20 proof exclude any reasonable doubt concerning the defendant's
21 guilt. A reasonable doubt is a doubt based upon reason and
22 common sense after careful and impartial consideration of all
23 the evidence in the case. Proof beyond a reasonable doubt,
24 therefore, is proof of such a convincing character that you
25 would be willing to rely and act upon it without hesitation in

1 making the most important decisions of your own affairs.

2 As I told you earlier, it is your duty to determine
3 the facts. To do so, you must consider only the evidence
4 presented during the trial. Evidence is the sworn testimony of
5 the witnesses including stipulations and the exhibits. The
6 questions, statements, objections and arguments made by the
7 lawyers are not evidence. The function of the lawyers is to
8 point out those things that are most significant or most
9 helpful to their side of the case and in so doing to call your
10 attention to certain facts or inferences that might otherwise
11 escape your notice. In the final analysis, however, it is your
12 own recollection and interpretation of the evidence that
13 controls in the case. What the lawyers say is not binding upon
14 you.

15 During the trial, I sustained objections to certain
16 questions. You must disregard those questions. Do not
17 speculate as to what the witness would have said if permitted
18 to answer the question. Also certain testimony or other
19 evidence has been ordered removed from the record and you have
20 been instructed to disregard this evidence. Do not consider
21 any testimony or other evidence that has been removed from your
22 consideration in reaching your decision. Your verdict must be
23 based solely on the legally admissible evidence and testimony.

24 Also do not assume from anything I may have done or
25 said during the trial that I have any opinion concerning any of

1 the issues in this case. Except for the instructions to you on
2 the law, you should disregard anything I may have said during
3 the trial in arriving at your own verdict.

4 In considering the evidence, you are permitted to draw
5 such reasonable inferences from the testimony and exhibits as
6 you feel are justified in the light of common experience. In
7 other words, you may make deductions and reach conclusions that
8 reason and common sense lead you to draw from the facts which
9 have been established by the evidence. Do not be concerned
10 about whether evidence is direct evidence or circumstantial
11 evidence. You should consider and weigh all of the evidence
12 that was presented to you. Direct evidence is the testimony of
13 one who asserts actual knowledge of a fact such as an
14 eyewitness. Circumstantial evidence is proof of a chain of
15 events and circumstances indicating that something is or is not
16 a fact. The law makes no distinction between the weight to be
17 given either direct or circumstantial evidence. The law
18 requires that you, after weighing all of the evidence, whether
19 direct or circumstantial be convinced of the guilt of the
20 defendant beyond a reasonable doubt before you can find him
21 guilty. I remind you that it is your job to decide whether the
22 government has proved the guilt of the defendant beyond a
23 reasonable doubt. In doing so, you must consider all of the
24 evidence. This does not mean, however, that you must accept
25 all of the evidence as true or accurate. You are the sole

1 judges of the credibility or believability of each witness and
2 the weight to be given to the witness's testimony.

3 An important part of your job will be making judgments
4 about the testimony of the witnesses including the defendant
5 who testified in this case. You should decide whether you
6 believe all, some part or none of what each person had to say
7 and how important that testimony was. In making that decision,
8 I suggest that you ask yourself a few questions. Did the
9 witness impress you as honest? Did the witness have any
10 particular reason not to tell the truth? Did the witness have
11 a personal interest in the outcome of the case? Did the
12 witness have any relationship with either the government or the
13 defense? Did the witness seem to have a good memory? Did the
14 witness clearly see or hear the things about which he or she
15 testified? Did the witness have the opportunity and ability to
16 understand the questions clearly and answer them directly? Did
17 the witness's testimony differ from the testimony of other
18 witnesses?

19 These are a few of the considerations that will help
20 you determine the accuracy of what each witness said. The
21 testimony of the defendant should be weighed and his
22 credibility evaluated in the same way as that of any other
23 witness. Your job is to think about the testimony of each
24 witness you have heard and decide how much you believe of what
25 each witness had to say. In making up your mind in reaching a

1 verdict, do not make any decisions simply because there were
2 more witnesses on one side than on the other. Do not reach a
3 conclusion on a particular point just because there were more
4 witnesses testifying for one side on that point. You will
5 always bear in mind that the law never imposes upon a defendant
6 in a criminal case the burden or duty of calling any witnesses
7 or producing any evidence.

8 In determining whether any statement, claims have been
9 made by the defendant outside of court and after an alleged
10 crime has been committed was knowingly and voluntarily made,
11 you should consider the evidence concerning such a statement
12 with caution and great care. You should give such weight to
13 the statement as you feel it deserves under all the
14 circumstances. You may consider in that regard such factors as
15 the age, sex, training, education, occupation and physical and
16 mental condition of the defendant. His treatment while under
17 interrogation and all the other circumstances and evidence
18 surrounding the making of the statement.

19 During the trial, you heard the testimony of an expert
20 witness who expressed opinions in this case. If scientific,
21 technical or other specialized knowledge might assist the jury
22 in understanding the evidence or in determining a fact in
23 issue, a witness qualified by knowledge, skill, experience,
24 training or education may testify and state an opinion
25 concerning such matters. Merely because such a witness has

1 expressed an opinion does not mean, however, that you must
2 accept this opinion. You should judge such testimony like any
3 other testimony. You may accept it or reject it and give it as
4 much weight as you think it deserves, considering the witness's
5 education and experience, the soundness of the reasons given
6 for the opinion and all other evidence in this case.

7 Where a defendant is offered opinion testimony
8 concerning truth and veracity and honesty and integrity, you
9 should consider such evidence along with all the other evidence
10 in the case. Evidence of a defendant's character, inconsistent
11 with those traits of character ordinarily involved in the
12 commission of the crime charged may give rise to a reasonable
13 doubt, since you may think it improbable that a person of good
14 character with respect to those traits would commit such a
15 crime.

16 The testimony of a witness may be discredited by
17 showing that the witness testified falsely or by evidence that
18 at some other time the witness said or did something or failed
19 to say or do something which is inconsistent with the testimony
20 the witness gave at this trial.

21 Earlier statements of a witness were not admitted in
22 evidence to prove that the contents of those statements are
23 true. You may not consider the earlier statements to prove
24 that the content of an earlier statement is true. You may only
25 use earlier statements to determine whether you think the

1 earlier statements are consistent or inconsistent with the
2 trial testimony of the witness and, therefore, whether they
3 affect the credibility of that witness. If you believe that a
4 witness has been discredited in this manner, it is your
5 exclusive right to give the testimony of that witness whatever
6 weight you think it deserves.

7 You will note that the indictment charges that the
8 offense was committed on or about a specific date. The
9 government does not have to prove that the crime was committed
10 on that exact date so long as the government proves beyond a
11 reasonable doubt that the defendant committed the crime on a
12 date reasonably near the date stated in the indictment.

13 You are here to decide whether the government has
14 proved beyond a reasonable doubt that the defendant is guilty
15 of the crime charged. The defendant is not on trial for any
16 act, conduct or offense not alleged in the indictment. Neither
17 are you called upon to return a verdict as to the guilt of any
18 other person or persons not on trial as a defendant in this
19 case.

20 If the defendant is found guilty, it will be my duty
21 to decide what the punishment will be. You should not be
22 concerned with punishment in any way. This should not enter
23 your consideration or discussion.

24 Title 18, United States Code, Section 2252A(a) (5) (B)
25 makes it a Federal crime for any person to knowingly possess

1 any material that contains an image of child pornography as
2 defined in Title 18, United States Code, Section 2256(8) that
3 involved a prepubescent minor or a minor that had not attained
4 12 years of age and that has been shipped or transported using
5 any means or facility of interstate or foreign commerce or that
6 was produced using materials that have been mailed or shipped
7 in or affecting interstate commerce by any means including by
8 computer.

9 For you to find the defendant guilty of this crime as
10 alleged in count one, you must be convinced that the government
11 has proved each of the following beyond a reasonable doubt.
12 First, that the defendant knowingly possessed an item that
13 contains an image of child pornography as alleged in the
14 indictment.

15 Second, the child pornography involved a prepubescent
16 minor or a minor that had not yet attained the age of 12 years.

17 Third, (a), the material was transported using any
18 means or facility of interstate or foreign commerce by any
19 means including by computer or, (b), the material was produced
20 using materials that had been mailed, shipped or transported in
21 or affecting interstate or foreign commerce by any means.

22 And fourth, when the defendant possessed the material,
23 the defendant knew the material contained child pornography.

24 If you find that the government has proved all of
25 these elements beyond a reasonable doubt, the defendant is

1 guilty of the crime of possession of child pornography
2 involving a minor that had not attained 12 years of age. If
3 you find that the government has failed to prove any one of
4 these elements beyond a reasonable doubt, then the defendant is
5 not guilty of the crime of possession of child pornography
6 involving a minor that had not attained 12 years of age.

7 "Possession", as that term is used in these
8 instructions, may be one of two kinds, actual possession or
9 constructive possession. A person who knowingly has direct,
10 physical control over a thing at a given time is in actual
11 possession of it. A person who, although not in actual
12 possession, knowingly has both the power and the intention at a
13 given time to exercise dominion or control over a thing, either
14 directly or through another person or persons is in
15 constructive possession of it. Possession may be sole or
16 joint. If one person alone has actual or constructive
17 possession of a thing, possession is sole. If two or more
18 persons share actual or constructive possession of a thing,
19 possession is joint. You may find that the element of
20 possession is present if you find beyond a reasonable doubt
21 that the defendant had actual or constructive possession either
22 alone or jointly with others.

23 The term "computer" means an electronic, magnetic,
24 optical, electrochemical or other high-speed data processing
25 device performing logical, arithmetic or storage functions and

1 includes any data storage facility or communication facility
2 directly related to or operating in conjunction with such
3 device. But such term does not include an automated typewriter
4 or typesetter, a portable handheld calculator, a thumb drive, a
5 CD or other similar device.

6 The term "child pornography" means any visual
7 depiction including any photograph, film, video, picture or
8 computer or computer-generated image or picture, whether made
9 or produced using electronic, mechanical or other means of
10 sexually explicit conduct where the production of such visual
11 depiction involves the use of a minor engaging in sexually
12 explicit conduct.

13 A "visual depiction" includes undeveloped film and
14 videotape, data stored on a computer disk or by electronic
15 means which is capable of conversion into a visual image and
16 data which is capable of conversion into a visual image that
17 has been transmitted by any means whether or not stored in a
18 permanent format.

19 "Sexually explicit conduct" means actual or simulated
20 sexual intercourse including genital-genital, oral-genital,
21 anal-genital or oral-anal, whether between persons of the same
22 or opposite sex, bestiality, masturbation, sadistic or
23 masochistic abuse or lascivious exhibition of the genitals or
24 pubic area of any person. Be cautioned that not every exposure
25 of the genitals or pubic area constitutes lascivious

1 exhibition. Whether a visual depiction constitutes such a
2 lascivious exhibition requires a consideration of the overall
3 content of the material.

4 You may consider such factors as whether the focal
5 point of the visual depiction is on the child's genitals or
6 pubic area, whether the setting of the visual depiction makes
7 it appear to be sexually suggestive, for example, in a place or
8 pose generally associated with sexual activity, whether the
9 child is displayed in an unnatural pose or in inappropriate
10 attire considering the age of the child, whether the child is
11 fully or partially clothed or nude, whether the visual
12 depiction suggests sexual coyness or a willingness to engage in
13 sexual activity or whether the visual depiction is intended or
14 designed to elicit a sexual response in the viewer. This list
15 is not exhaustive and no single factor is dispositive.

16 Commerce includes travel, trade, transportation and
17 communication. Interstate commerce means commerce or travel
18 between one state, territory or possession of the United States
19 and another state, territory or possession of the United States
20 including the District of Columbia. Foreign commerce means
21 commerce or travel between any part of the United States
22 including its territorial waters and any other country
23 including its territorial waters. Using a facility or means of
24 interstate commerce means employing or utilizing any method of
25 communication between one state and another. A telephone is

1 considered a facility or means of interstate commerce, whether
2 it is used in the traditional manner or whether it is used in
3 conjunction with the computer and modem. Likewise, the
4 Internet is considered a facility or means of interstate
5 commerce.

6 It is not necessary for the government to prove that
7 any use of a facility in interstate commerce was contemplated
8 or planned at the time the course of activity began or that the
9 defendant knew that he was actually using a facility of
10 interstate commerce. It is not necessary for the government to
11 prove that the defendant knew the alleged child pornography had
12 moved in interstate or foreign commerce, only that it had so
13 moved. It is not necessary that the government prove the
14 defendant knew the interstate nature of an instrument on which
15 a depiction of child pornography is produced.

16 The word "knowingly" as that term has been used from
17 time to time in these instructions means that the act was done
18 voluntarily and intentionally, not because of mistake or
19 accident. Guilty knowledge may not be inferred solely from
20 ownership or access to a computer. Where the government claims
21 possession of images of claimed child pornography on a
22 computer, the government must prove that the defendant had
23 actual knowledge that there was child pornography on the
24 computer.

25 To reach a verdict, whether it is guilty or not

1 guilty, all of you must agree. Your verdict must be unanimous
2 on the count charged in the indictment. Your deliberations
3 will be secret. You will never have to explain your verdict to
4 anyone. It is your duty to consult with one another and to
5 deliberate in an effort to reach an agreement if you can do so.
6 Each of you must decide the case for yourself, but only after
7 an impartial consideration of the evidence with your fellow
8 jurors.

9 During your deliberations, do not hesitate to
10 re-examine your own opinions and change your mind if you are
11 convinced that you were wrong. But do not give up your honest
12 beliefs as to the weight or effect of the evidence solely
13 because the opinion of your fellow jurors or for the mere
14 purpose of returning a verdict. Remember at all times, you are
15 the judges, judges of the facts. Your duty is to decide
16 whether the government has proved the defendant guilty beyond a
17 reasonable doubt.

18 When you go to the jury room, the first thing that you
19 should do is select one of your number as your foreperson who
20 will help to guide your deliberations and will speak for you
21 here in the courtroom. A verdict form has been prepared for
22 your convenience.

23 The foreperson will write the unanimous answer of the
24 jury in the space provided for each count of the indictment,
25 either guilty or not guilty.

1 At the conclusion of your deliberations, the
2 foreperson should date and sign the verdict. If you need to
3 communicate with me during your deliberations, the foreperson
4 should write the message and give it to the court security
5 officer. I will either reply in writing or bring you back into
6 the court to answer your message. Bear in mind that you are
7 never to reveal to any person, not even to the court how the
8 jury stands numerically or otherwise on any count of the
9 indictment until after you've reached a unanimous verdict.

10 THE COURT: Thank you very much. All right. Now,
11 ladies and gentlemen, we're going to take about a five-minute
12 recess. You don't want a five-minute recess? We do need to
13 take a five-minute recess and then we're going to come back,
14 because counsel needs to set up. We're going to come back and
15 then counsel will be making their closing argument, all right.

16 COURT SECURITY OFFICER: All rise for the jury.

17 * * *

18 THE COURT: Now that the jury is gone, what we need to
19 do at this time, counsel, this is the statutory time to make
20 objections to the jury instructions. What I would propose to
21 do is to incorporate by reference at this time our jury
22 settlement conference that we had earlier today as if done at
23 this time, along with any objections, comments or statements by
24 counsel as well as any comments, statements or rulings by the
25 Court as if done at this time. Any objection to that process?

1 MR. EDWARD BARTOLOMEI: No, Your Honor.

2 MS. THOMPSON: No, Your Honor.

3 THE COURT: So ordered. Okay. Get yourself ready.
4 We'll come back in about two to three minutes and we'll get
5 going.

6 (2:23 p.m.)

7 * * *

8 (2:32 p.m.)

9 COURT SECURITY OFFICER: All rise.

10 THE COURT: Please be seated. Bring the jury in.

11 * * *

12 COURT SECURITY OFFICER: Rise for the jury.

13 THE COURT: Please be seated. The Court would note
14 the presence of the ladies and gentlemen of the jury, as well
15 as all the parties.

16 All right, ladies and gentlemen, you're now going to
17 be hearing the closing arguments of counsel. As I told you in
18 the first day of trial when you heard the opening statements,
19 closing arguments of counsel is not evidence. In the opening
20 statement, what the lawyers are supposed to be doing is telling
21 you what they believe the evidence will show. We're going to
22 flip that on its head now because now they're supposed to be
23 telling you what they believe the evidence has shown, okay, and
24 they're going to be commenting on that evidence. That is
25 they're going to be putting their spin, which is what they're

1 supposed to be doing, on the evidence in such a way that they
2 feel you should be looking at it, okay. They're going to tell
3 you about what they believe is the right way for you to be
4 looking at the evidence. And they're going to be recalling
5 items of evidence. Now, if your recollection of the evidence
6 is different from the lawyer's recollection of the evidence,
7 your recollection controls. Okay. So it's really important
8 for you to remember that. And it's also very important for you
9 to remember that the lawyer's job is to try to convince you of
10 something, okay. Now, this does not mean, as I told you
11 before, that there's anything wrong with that. That's their
12 job, but you need to be aware of that, okay, and that's true
13 for government's counsel, it's true for defense counsel, okay.
14 So there's nothing wrong with that. They're doing their jobs,
15 but you need to be aware of that so that you keep that in mind,
16 okay. Are you ready, counsel?

17 MS. THOMPSON: Yes, Your Honor.

18 THE COURT: First we hear from government's counsel,
19 then we hear from defense counsel and then we hear a short
20 rebuttal from government's counsel because they bear the burden
21 of proof. Now, Ms. Thompson, are you going to reserve some
22 time for your rebuttal? You have 40 minutes. Are you going to
23 reserve some time for your rebuttal?

24 MS. THOMPSON: I am planning on doing that.

25 THE COURT: Well, you better because you won't get a

1 rebuttal if you don't reserve some time. So you need to tell
2 her at what point you want her to let you know.

3 MS. THOMPSON: I'm going to time it and then whatever
4 I have left I'll use for rebuttal.

5 THE COURT: Well, you're going to hear from her also.

6 MS. THOMPSON: Okay.

7 THE COURT: You may start at any time you're ready.

8 MS. THOMPSON: Thank you, Your Honor.

9 May it please the Court, members of the jury, in order
10 for you to find the defendant guilty of the sole count in the
11 indictment in this case, the government has to prove four
12 things to you beyond a reasonable doubt. I mentioned those in
13 opening in order to try and give you a road map so that as you
14 listen to the evidence and hear the testimony, you would know
15 how to put those into perspective. Those are on or about
16 October 22nd of 2015, the defendant knowingly possessed an item
17 containing an image of child pornography. Two, the material
18 involved a prepubescent minor or a minor under the age of 12.
19 Three, that the material was transported using any means or
20 facility of interstate or foreign commerce. And four, when the
21 defendant possessed the material, he knew it was child
22 pornography. Those four things. If you find that the
23 government has proven those four things beyond a reasonable
24 doubt, then you should find the defendant guilty.

25 The first element is the defendant knowingly possessed

1 an item containing an image of child pornography as alleged in
2 the indictment. The item is the Dell laptop computer. You
3 heard testimony that it contained over 2500 images depicting
4 child pornography and 112 videos depicting child pornography.
5 Those are listed in Exhibit Six. And the images are contained
6 in Exhibit 6a as well as Exhibits 11, 12 and 13.

7 The "alleged in the indictment" part means the
8 defendant possessed it on October 22nd of 2015. That's the day
9 that the Search Warrant was executed when the defendant was
10 interviewed by Special Agent Juarez and Special Agent DePaola
11 and then agreed, told them about his laptop computer and led
12 the agents to his office, unlocked the office, showed them
13 where his desk was, took the laptop off the desk, provided it
14 to law enforcement and signed the consent to search form which
15 allowed them to take it and search it.

16 The second element is that the material or the child
17 pornography involved prepubescent minors or minors under the
18 age of 12. Special Agent Sean Mullen from the FBI testified
19 that he has personally met five of the victims listed in three
20 series. Remember, he testified about the C Baby series and you
21 saw Exhibit 11n which was C Baby One who was three years old at
22 the time performing oral sex on an adult male. He also
23 testified that C Baby Two was eight years old and that she was
24 engaged in a variety of sex acts that are listed on Exhibit 11.
25 MC Girl, the Minecraft girl, there were two sisters, he

1 testified they were four and five years old at the time the
2 images were produced. And those images were found on the
3 defendant's computer. And he also testified that the victim of
4 the Tent series was ten years old at the time the images were
5 found on the defendant's laptop. That's element number two.

6 The third element is that the child pornography was
7 transported using any means or facility of interstate or
8 foreign commerce. Special Agent Sean Mullen testified that the
9 images depicted in the MC Girl series, which is the one of the
10 four and five-year-old children, were first discovered by law
11 enforcement when the FBI in Maryland found them on a hidden
12 server and downloaded them in Maryland. Those children you
13 heard were sexually assaulted in Round Rock, Texas. After they
14 were downloaded by the FBI in Maryland, the lead went through
15 to Special Agent Mullen. And remember, he, based on one of the
16 T-shirts the girls was wearing, went to the school and was able
17 to identify both children in a year book at the school. He
18 also testified that those images were posted by the man that
19 took them on the Internet on a hidden server named Lolita City.
20 If you remember, one of the defendant's search terms was
21 Lolita.

22 The images of MC Girl One and Two were accessed
23 through the onion router on the Internet and downloaded in
24 Maryland. They were clearly transported in interstate and
25 foreign commerce. He also testified about C Baby One and Two.

1 C Baby One is the little three-year-old that was engaged in --
2 that was forced to perform oral sex and C Baby Two was the
3 eight-year-old. He testified that those images, same ones that
4 were found on the defendant's computer, were found in a variety
5 of states, as well as in Germany. When those images are found
6 in different states and those cases go to trial, he told you he
7 had to go testify in those states and in Germany and identify
8 the images of those children. Those children were sexually
9 assaulted in Bastrop, Texas, he told you. So those images have
10 been transported in interstate and foreign commerce having been
11 found in Germany.

12 With regard to the Tent series, that's the 10-year-old
13 little girl that you saw an image of. In 13a she was
14 blindfolded and her genitals were lasciviously displayed. In
15 13b she was being digitally penetrated by an adult male.
16 Special Agent Mullen testified that the C Baby series was
17 connected to the Tent series, they were both produced in
18 Bastrop, Texas. The Tent series started out in Maine when law
19 enforcement identified the images and started that
20 investigation. He told you that the same images found on the
21 defendant's computer in this case were found in states such as
22 Georgia and Kansas and he's had to testify in those states
23 after the images were found there. Those images have traveled
24 in interstate commerce.

25 All of the images in 11, 12 and 13, the C Baby series,

1 MC Girl and Tent were all found in the music folder on the
2 defendant's computer and are listed in Exhibit Six, the big
3 forensic report listing all of the image and video files.

4 So then the last element that the government has to
5 prove beyond a reasonable doubt is that when the defendant
6 possessed the material, he knew it was child pornography. How
7 do you know this? Well, he told Special Agent DePaola and
8 Special Agent Juarez during the interview the day of the Search
9 Warrant that he had seen them, that he had visited different
10 websites, he searched for material and all of that happened on
11 his laptop computer.

12 You've been instructed by the Court that you are the
13 sole judges of the credibility and believability of each
14 witness and the weight to be given to the witness's testimony.
15 You get to factor in whether someone has a particular reason
16 not to tell the truth, whether a witness has a personal
17 interest in the outcome of the case and what weight to give
18 each person's testimony, if any. You get to decide who to
19 believe, who not to believe, what to believe and how much to
20 believe. In this case, the government submits that there's not
21 a whole lot of middle ground. Special Agent Juarez and Special
22 Agent DePaola testified very differently than how the defendant
23 testified. So this case comes down to who do you believe
24 because their testimony is day and night different.

25 The testimony of the special agents in regard to what

1 occurred on October 22nd of 2015, the government contends makes
2 sense and is supported by the forensic evidence and the other
3 facts in the case. During the interview, the defendant was
4 asked what electronic devices were at the house. Remember,
5 they went to the house and started the Search Warrant. As soon
6 as they did the protective sweep, then the special agents went
7 into the living room and told people they were executing a
8 Search Warrant. They could leave, they could stay, but you
9 can't interfere with a Search Warrant. And they asked the
10 defendant if he would be willing to speak with them out in
11 Agent DePaola's car and he agreed.

12 They went out into the car, again the agents told him
13 he didn't have to talk to them, this had to be voluntarily, but
14 they wanted to ask him some questions about the child
15 pornography that had been downloaded to his house. Remember,
16 the subject of the Search Warrant was five images that were
17 shown to Mr. Michalik during the interview. Five images of
18 child pornography were downloaded on August 4th of 2014 from
19 the Amateur Lovers website directly to the defendant's house.
20 What they learned during the execution of the Search Warrant
21 and the interview --

22 MR. RICHARD BARTOLOMEI: May we approach?

23 THE COURT: On what basis?

24 MR. RICHARD BARTOLOMEI: So we don't have to --

25 THE COURT: All right.

1 * * *

2 *(Sidebar.)*

3 MR. RICHARD BARTOLOMEI: There is absolutely no
4 evidence that they were downloaded to the house, it goes to an
5 IP address and those are not even on the computer. That is a
6 misstatement of the record.

7 MS. THOMPSON: They weren't found on the computer at
8 the time of the Search Warrant months later, but they were
9 definitely downloaded to that house. It's in the Search
10 Warrant application that he insisted I put in as evidence.

11 MR. RICHARD BARTOLOMEI: Your Honor.

12 THE COURT: I'm going to let -- if this is an
13 objection, I'm going to overrule the objection and I will let
14 the jury decide. This is an issue you can raise in your
15 closing argument.

16 *(Sidebar concluded.)*

17 * * *

18 THE COURT: You may continue, counsel.

19 MS. THOMPSON: Thank you, Your Honor.

20 If you'll recall, the Search Warrant was based on five
21 pictures that were downloaded from the Amateur Lover website to
22 the defendant's house, his IP address. The woman from AT&T,
23 Ms. Caravello, testified that the IP address listed on the
24 images that were downloaded was 75.1.83.139. And that that
25 specific IP address was assigned to the defendant at his house

1 at 9718 Hidden Iron Drive from June 10th of 2013 through the
2 date that the Search Warrant was signed. Exhibit Number One
3 will show you that information and that he was the account
4 holder, that was the address and then that was the IP address
5 that was only used at that house. And the way you would have
6 to use that IP address is you would have to know the name of
7 the Internet router and you would have to know the password for
8 that Internet access in order to get onto the Internet.

9 So after they started the interview and they're
10 explaining to Mr. Michalik why they're there, they're asking
11 him about the electronic devices that are found in the house
12 and he lists the different desktop computer and phones and the
13 tablet that were in the house. When asked if there are any
14 other devices, he states I have an iPod in my truck and there's
15 a Dell laptop computer at my office.

16 The defendant's version, what he testified to is he
17 never mentioned that laptop computer, he never told Special
18 Agent DePaola that he had a laptop computer at work. That she
19 just all of a sudden knew that there was this laptop computer
20 at his office that would contain child pornography.

21 Now remember, as the Search Warrant is ongoing at the
22 house, nobody has done a forensic preview, nobody from Homeland
23 Security knows what's on any of those devices. Turns out none
24 of the devices at the house contained child pornography, but
25 nobody knew that then. The defendant wants you to believe that

1 when nothing was found at the house, they had to find some
2 device that had child pornography. You've been instructed to
3 use your reason and common sense and I will suggest to you that
4 those may be the most important tools you have as jurors. You
5 get to determine what makes sense to you, what's logical, does
6 this make sense or does this make sense in determining the
7 believability of witnesses.

8 The search of the electronic devices at the house had
9 just started when the defendant agreed to be interviewed, so
10 they had no idea whether any child pornography had been found
11 at the house. The defendant tells Special Agent DePaola and
12 Special Agent Juarez in the interview that he has the laptop
13 and he uses it at work and admitted that he has searched
14 pornography websites on the laptop. That prompted the agents
15 to ask him if he had ever seen child pornography. What was his
16 answer? It wasn't no. It was, Well, I don't really like the
17 young, the little child pornography, the little person younger
18 ones, I probably have seen child pornography with high school
19 age girls.

20 And remember, Special Agent Juarez and Special Agent
21 DePaola both testified about his interview. And that he had
22 seen child pornography involving teens and young teens on a
23 variety of different websites. The defendant claims he never
24 admitted to searching or viewing child pornography, that all of
25 that is made up by the agents, that he never said any of that.

1 I'm going to pose to you, if the agents are going -- I mean,
2 one, what does your common sense say about that? Does that
3 make sense given all the evidence in this case? Wouldn't it
4 make sense that his statement would be better than that? He
5 wouldn't say he preferred teenagers, he'd say he preferred
6 babies. Same with the search terms. He told Special Agent
7 Juarez and Special Agent DePaola that when he searches for
8 child pornography he uses a variety of terms, yoga pants, puffy
9 pussies, sexy teens, young sexy teens and Lolitas.

10 If you look through the files in Exhibit Six, there's
11 over 50 file titles that have the term "Lolita" in terms.
12 There's a variety of file titles that have "PTHC" and a variety
13 of the other terms. He was asked if he specifically recalled
14 the Amateur Lovers website when he is shown those five images.
15 He's asked about the Amateur Lovers website and he says he
16 doesn't recall that one. He did remember two of the images, as
17 you remember, 5a and 5b and initialed those, saying, Yup, I've
18 seen those before. But he didn't say he saw them on the
19 Amateur Lovers website, he said he saw them on a variety of
20 other websites including the one named Little Puffy Pussies.
21 Does it make sense that that is accurate? Or that that's made
22 up by the agents? I'm not suggesting the agents would ever
23 make up information, but wouldn't you say that he did recognize
24 the website that five images of child pornography that went to
25 his house came from?

1 He was asked if he knew the meaning of the term "PTHC"
2 and he stated it meant younger ones. He was then shown the
3 five images and identified two out of the five. His story is
4 that he was just going along, he didn't feel like he could say
5 no. Well, he clearly said no to three of the images. He
6 didn't initial those. He differentiated which ones he
7 remembered seeing before and which ones he didn't remember
8 seeing before.

9 The defendant also told special agents that the last
10 child pornography video he remembered watching was titled Good
11 Blow Job or something like that and depicted a child about 14
12 years old. In Exhibit Six there is a file titled Girl
13 14-year-old Blow Job. There is a variety of other ones that
14 depict the same exact sexual activity. Item 946 is 14-year-old
15 Blow Job, item 1337 is 9-year-old Girl Sucking Great Blow Job
16 and there's a variety of others that you can look through. The
17 defendant also tells the agents in the interview that on
18 October 19th of 2015, he watched a video titled Dogie Style
19 that depicted a 12 to 14-year-old child. Item number 300 is a
20 file titled Maja Dogie Style 12-year-old. Remember, at this
21 time, the agents have no idea what's on this computer. They're
22 talking to him in the car while the Search Warrant is going on.
23 They don't know what's on the computers at the house and they
24 have no way of knowing what's on the laptop computer.

25 He also tells the special agents that on October 21st

1 of 2019, he searched for yoga pants and puffy pussies. And
2 while that may not seem directly connected to child
3 pornography, remember when he was looking through the five
4 images that were downloaded from the website to his house, he
5 recalled seeing them on a variety of websites, one of which was
6 called Little Puffy Pussies.

7 It's also important to factor in the Mozilla Firefox
8 folder evidence. You heard testimony that some of the images
9 in the forensic report and they're listed at items 1174 to
10 1220, I believe. When asked if he knew what the term "PTHC"
11 stood for, he didn't know what the actual acronym was, he
12 didn't know it meant pre-teen hard core, but he did know that
13 it meant younger ones. He knew that if you put that in, you'd
14 get younger material. And that's important in this case
15 because in Exhibit Seven, if you recall, Exhibit Seven is the
16 search query. You heard testimony that somebody sitting at the
17 defendant's laptop had to physically type in VK PTHC and then
18 hit search. You heard testimony that they were using the Bing
19 search engine and that they were searching for videos and that
20 it happened on November 14th of 2014 at 5:45 UTC time.

21 We heard that UTC time is six hours different than
22 central standard time. So if someone is searching for PTHC on
23 the laptop on November 14th at 5:43, it's really November 13th
24 at 11:45 p.m. because you subtract the six hours. So if I go
25 back six hours and it's November 13th at 11:45, I type in PTHC.

1 COURTROOM DEPUTY CLERK: Twenty minutes.

2 MS. THOMPSON: When you look at the Mozilla Firefox
3 folder, you'll see the 46 files that were downloaded or
4 viewed -- sorry, not downloaded, viewed on the Internet at
5 exactly that time. 1174, 1193, for example, was downloaded
6 using Mozilla Firefox, so he's going to the Internet. And that
7 file was created on November 13, 2014 at 11:59 p.m., so he
8 types in PTHC at 11:43, 11:45 and just minutes later 46 child
9 pornography files are viewed using that laptop on the Internet.
10 That was only four months after the five child pornography
11 files were downloaded to his house using his secure Internet
12 from Amateur Lovers website. And it was less than a year
13 before the execution of the Search Warrant when he gave consent
14 to search his laptop computer that had over 2500 images and 112
15 videos.

16 The government submits that the evidence in this case
17 shows beyond a reasonable doubt that the defendant knowingly
18 possessed child pornography on the laptop on November 22nd when
19 he provided it to law enforcement. All of the evidence in this
20 case, all the credible evidence in this case points to the
21 defendant. Thank you.

22 THE COURT: So you have reserved some time. Seventeen
23 minutes, you've got a full 17 minutes.

24 MS. THOMPSON: Thank you, Your Honor.

25 MR. RICHARD BARTOLOMEI: Your Honor, members of the

1 jury, opposing counsel, let's start out with dispelling a few
2 things that you were just told. I asked Mr. Linares, Any
3 forensic evidence that any of this was ever downloaded, viewed,
4 saved by the defendant from your report. Answer, No. Any
5 evidence -- same thing was asked for Mr. Nutt. Any evidence
6 that any of this from forensic evidence directly shows that the
7 defendant ever viewed much less downloaded or saved any of this
8 evidence. You were present. They said, each of them, no.
9 Were these exclusively within the possession of the defendant?
10 No. The evidence is rather overwhelming, I would point out,
11 that this laptop was not password protected.

12 I believe the government stated that the Internet
13 access to the router was password protected or secured. One of
14 the last questions that I asked Mr. Nutt, I asked when the
15 judge mentioned did you ever determine if there was a password
16 through the router to the Internet, Mr. Nutt said, I do not
17 recall if there was.

18 MS. THOMPSON: Objection. That's a misstatement of
19 the testimony.

20 MR. RICHARD BARTOLOMEI: Excuse me. I don't recall if
21 there was or there was not. With that correction, he doesn't
22 know, they never checked. That was his exact testimony.

23 Now, with regard to whether or not there were any
24 images, interestingly enough, in Six, Mr. Linares was asked did
25 you put in the name Mr. Michalik in the pathway. Putting up

1 Six please, on page five. Went through a series of questions
2 with Mr. Linares. Remember Mr. Linares creates both of these
3 reports, but during the middle of trial, after opening
4 statements apparently portrayed a small whole, I would suggest
5 they came up with 6b. And 6b which is given to us during the
6 middle of the trial --

7 MS. THOMPSON: Your Honor, I'm going to object.

8 THE COURT: I'm going to strike -- yes, I'm going to
9 strike that. There's no need for that.

10 MR. RICHARD BARTOLOMEI: Okay. Let's go through a
11 little bit of what Mr. Linares said. One, he acknowledged no
12 direct forensic evidence that the defendant or anyone in
13 particular downloaded, viewed or saved. So we know that. That
14 was confirmed by Mr. Nutt, both Six and 6b, no one ever finds
15 through these forensic examinations that the defendant ever
16 views, downloads, saves, retains or even opens any of these
17 files. How do we know this is so? Because on Six, the
18 government had two witnesses say, Oh, the access time doesn't
19 matter, it doesn't matter. The file creation time and the
20 purported access time are identical. And if you remember, one
21 of the last questions I asked Mr. Nutt is, You can't open three
22 different files that he was asked about that are created at the
23 same moment and the exact same instant it says they're
24 accessed, you can't do that manually as a human being. And he
25 said correct. So even their own forensic files do not show

1 that any of these purported files were ever viewed by anybody.

2 MS. THOMPSON: Objection. That's a misstatement of
3 the testimony.

4 THE COURT: That objection is sustained. Now, when I
5 sustain an objection like that, ladies and gentlemen, remember
6 what I say even my sustaining the objection, you are the ones
7 to determine and only you what the testimony was.

8 MR. RICHARD BARTOLOMEI: With respect, Your Honor, I
9 have the exact testimony if I may read it.

10 THE COURT: You can do whatever you want with your
11 time.

12 MR. RICHARD BARTOLOMEI: If you look at 6b, just like
13 6a, there's no forensic evidence to show that the defendant
14 accessed those files, isn't that true? His answer, Specific
15 person, no.

16 So I believe I'm correct in whatever I presented to
17 you. Now, there's two aspects to this case, as I see it. The
18 first part is the forensic evidence. There's been a lot of
19 discussion and a lot of evidence regarding the forensic
20 evidence. What we do know is that both Mr. Linares and Mr.
21 Nutt have conceded there's no direct forensic evidence linking
22 Mr. Michalik. Furthermore, you've had testimony from Ed
23 Michalik, you've had testimony from Crystal Rivas and the
24 defendant, he didn't elect not to take the stand, he took the
25 stand. Now why is this important? Because Mr. Nutt finally

1 had to acknowledge the access from the company AT&T to the
2 router was not secured. He didn't know. And everyone, and I
3 mean everyone on both sides acknowledges the computer itself is
4 not password protected. Why is that important? Because you
5 have testimony from Mr. Michalik, you have testimony from
6 Ms. Rivas, you have testimony I believe from even Mr. Just and
7 you have testimony from the defendant how this computer was
8 used among and with the other computers. The point is they
9 were open, anybody could use them, all you had to do was turn
10 them on and you could use them. You didn't have an identifying
11 user. How do we know from the forensic evidence that they
12 produced? Because in every single file the user is David S,
13 Dave Smith. So there is no identification of the user. There
14 is no identification in the user pathway. They would have you,
15 I would suggest, believe that the fact that that name doesn't
16 have Mr. Michalik, you should disregard that.

17 Well, computers are funny. You must have determined
18 by now that these pathways that they forensically examined
19 actually are quite precise. In one sense they tell you who the
20 user is, except it's always David S. Now, I suspect their
21 explanation will be, well, that's the default because he's
22 still listed as the administrator. Why would David Smith be
23 the administrator after closing the company and transferring
24 whatever assets or however when Michalik brothers start their
25 business? I don't have an answer for that, but remember I

1 asked Mr. Nutt, can you have Windows 7 and Windows 10 in the
2 same computer? And he talked about dual booting. Their report
3 doesn't show whether they ever examined the other drive --
4 excuse me, the other operating system.

5 MS. THOMPSON: Objection, Your Honor. That's a
6 misstatement of the testimony.

7 MR. RICHARD BARTOLOMEI: Your Honor --

8 THE COURT: I'm going to leave it to the jury to
9 determine the facts of this case.

10 MR. RICHARD BARTOLOMEI: I asked the question about
11 whether or not and I asked him about Windows 10, and obviously
12 EnCase runs by Windows 10, but remember the Michalik brothers
13 are not the world's greatest computer people. They have to use
14 programs that are only consistent with Windows 7. Now, why is
15 that important? Nobody ever searched. None of the forensic
16 search involves anything regarding the other drive or, excuse
17 me, the other operating system of Windows 7, none of them.

18 Now, with regard to back to Mr. Linares, I want to go through
19 this very quickly. I asked Mr. Linares, nowhere in this report
20 does it show that Windows 7 was removed from the computer. His
21 answer was correct. And he acknowledged that the

22 administrator, the first line 11/20/10, he acknowledged if the
23 computer was wiped, that wouldn't be in there and --

24 MS. THOMPSON: Again a mischaracterization of the
25 testimony, Your Honor.

1 THE COURT: I'm going to sustain that objection.

2 MR. RICHARD BARTOLOMEI: Well, I leave it to you on
3 your recollection. There's a reason I have it. Now, no
4 account matches the defendant, no security ID matches the
5 defendant. Mr. Nutt said, well, I don't know all the
6 identifications.

7 There was another aspect of this about IP addresses.
8 Mr. Linares acknowledged, well, the IP address only goes to the
9 router. I believe even Agent Juarez knew that. Certainly
10 there's never been any testimony that the router is the same as
11 the computer. And I believe I asked could other computers
12 using that router all come back to the same IP and the answer
13 was, well, yes. So six computers, five computers, ten
14 computers, all access the same IP address. Now, no one that I
15 know of ever established, at least from the government, it's
16 their burden of proof, I don't believe anyone ever proved that
17 that computer used other than at home wouldn't come to the same
18 IP address. That's their burden of proof. We can't negative
19 every possible permutation and combination. They'll say we
20 can't do that either. And there, ladies and gentlemen, is the
21 problem. They can't negate it, but neither can they prove it
22 and it is solely their burden.

23 Now, with regard to other aspects of Mr. Linares,
24 because this is the forensic aspect, there was testimony both
25 by Mr. Nutt and Mr. Linares about certain records and we went

1 to records I think it was 12, record 12, record 52 and record
2 90, and pointing more to Mr. Nutt. Mr. Nutt acknowledged,
3 well, the times for creation and the times -- remember, these
4 three involved the very same file, if you'll recall. And for
5 all three files it was the exact same opening time, creation
6 time and the exact same access time. And even he had to
7 acknowledge, well, you can't have opened all three manually at
8 the same time, that's physically not possible, notwithstanding
9 that he acknowledged we don't have any direct evidence that
10 Mr. Michalik did it, where Mr. Michalik was or who was there or
11 how it was used on a non-password protected computer.

12 Now, with regard to several other aspects of the case,
13 I'm going to go through some of the arguments that you heard
14 from the government. One of them was that -- and this goes to
15 some of the claims about the statements and images from Amateur
16 Lover. Even the government agents, Ms. Juarez and Ms. DePaola,
17 both say he didn't know anything about Amateur Lover. All of
18 the government's witnesses that testify about those images
19 acknowledge, even Ms. Juarez, none of those images are found on
20 the computer. So where did they go? Well, they can't explain
21 that, but they all acknowledge, well, when we did get the
22 computer, none of the images are on the computer. Yet the
23 government asks you to tie together two things. You can look
24 at the images that he supposedly identifies. Remember, his
25 testimony is a lot different, though subtly different from what

1 the government says. The government says he admitted he saw
2 them on his laptop. He said he may have seen them on an old
3 work computer. Let's look at the time. Those images come
4 through the IP address in 2014 when the business is still open
5 with Dave Smith, when there are salesmen, customers, all manner
6 of persons who have access to an open computer. So certainly
7 not within the exclusive possession of the defendant. And I
8 don't think anybody reasonably disputes that. So also those
9 images, if you view them, viewing something is not the same as
10 possessing something. And that's why it's important to
11 remember if they're not in the computer, there is absolutely no
12 viable argument that the defendant possessed those images.
13 Very important.

14 Now, they talked about also recognizing websites. I'm
15 going to start because I think this is very important about the
16 voluntary nature. What is the one piece of evidence that the
17 government didn't bring? Now, Agent Juarez, no, we didn't
18 record it. Agent DePaola, well, we didn't record it. They
19 said, well, we're not given body cams. That's their
20 explanation. We can give you assault rifles, flack vests, we
21 can have eight agents to ten agents, but we can't have a
22 recording device. I asked Ms. DePaola, Do you have a policy on
23 that? Well, no, not a policy. Did you record it? No. Could
24 you have recorded it? Well, yeah.

25 Now, let's think about that because that's very

1 critical. Why don't you bring the notes if those are the only
2 recording or memorialization, why didn't the government come
3 with the notes?

4 MS. THOMPSON: Objection, Your Honor, that would be
5 inappropriate.

6 THE COURT: Sustained.

7 MR. RICHARD BARTOLOMEI: Your Honor, I'm entitled to
8 argue what they do not bring.

9 MS. THOMPSON: Defense counsel was given the notes in
10 this case.

11 MR. RICHARD BARTOLOMEI: Your Honor, I'm going to
12 object to that. The question was did the government put into
13 evidence the only record and I think I'm entitled to argue that
14 to the jury.

15 THE COURT: I think that what we have here is a
16 situation where the government put the witness on the stand
17 and, therefore, the notes would be hearsay to some degree and
18 the best evidence would be the witness's testimony and the
19 notes could be used to impeach the witness.

20 MR. RICHARD BARTOLOMEI: With respect, Your Honor,
21 it's exactly the opposite. The best evidence would have been
22 the written document, as we all know, it's called the best
23 evidence rule.

24 MS. THOMPSON: That is inappropriate and incorrect.

25 THE COURT: In any event, let's just go on with your

1 argument.

2 MR. RICHARD BARTOLOMEI: There's no notes.

3 MS. THOMPSON: Objection. There are notes. That's a
4 misstatement and improper argument.

5 THE COURT: Counsel, just go on with your argument.

6 MR. RICHARD BARTOLOMEI: Thank you. Let's talk about
7 whether or not these statements that they attribute to the
8 defendant, which incidentally he took the stand, she
9 cross-examined, meaning the government, and he said no, I
10 didn't say that, or I said something different.

11 But of course, what else can you do? He's the only
12 other person there. Let's talk about the voluntary nature of
13 this. 6:05 in the morning, they have to wait until after 6:00
14 because they need a special court order. Three agents come up,
15 the defendant is leaving. They meet him at the vehicle and
16 tell him, We have a Search Warrant, we have to get in the
17 house.

18 They walk him back. I ask Agent Juarez, I believe,
19 Did you tell him at that point once the door got open you could
20 leave? Well, no, not at that point.

21 He goes into the house and he's told, Call everybody
22 out. He makes one statement calling people down, it's dark
23 inside the house, it's early in the morning and then other
24 armed agents begin yelling, Come down, come out!

25 Do you remember Agent Juarez couldn't say whether

1 their guns were drawn, but finally Agent DePaola said, well,
2 yes, they would have had guns drawn, but how do we know what
3 it's really like. We know what it's really like because
4 Crystal Rivas is called down, she gets halfway down the
5 stairwell, there are flashlights, people yelling, Come down,
6 come down. And at the bottom of the steps are two agents with
7 assault rifles. I don't think I have to interpret for you how
8 frightening that is, but her statement was, First I thought we
9 were getting robbed, then they're pointing assault rifles at
10 us. What was your reaction? I was terrified.

11 There's certainly a conflict of testimony about what
12 the agents claim they said, but Crystal Rivas testifies they
13 didn't tell me I was free to leave, they didn't tell all of us
14 we were free to leave. They told us they had a Search Warrant,
15 child pornography was coming through this house and they had a
16 Search Warrant for all the electronic devices. Even Agent
17 DePaola acknowledges, well, yes, loud voices, commanding
18 voices. That's how you secure the place.

19 Now, the government said, well, he wasn't handcuffed.

20 COURTROOM DEPUTY CLERK: Twenty minutes.

21 MR. RICHARD BARTOLOMEI: There's an old movie, Gary
22 Cooper starred in it, very famous lines, black and white, many
23 of you may not know it. The point is in the movie, the cowboy
24 leaning against the bar makes a sny remark to Cooper, Cooper
25 spins, flips the gun up in his face and says, "Smile when you

1 say that." And it became a famous line. It's been passed down
2 for decades. I think the better line was the line that
3 followed, "I always smile with a gun in my face."

4 I invite you to consider how docile you become with an
5 assault rifle in your face. Do you forget it? No. Do you
6 forget it after five to seven minutes when the sweep is
7 completed? I think not because they're still standing there
8 with the guns. A child, a grandmother and Crystal Rivas are
9 put on the sofa. Remember the testimony and this is
10 interesting I think for all of us, Agent Juarez, Agent DePaola
11 acknowledge we never left his side. They went with him
12 everywhere. So now you're guarded and escorted by two armed
13 agents. He's in the corner, remember, we talked about it in
14 the house. They don't ask him, according to him, and no one
15 else apparently hears them do so. There's no discussion of his
16 privacy, how they can make this more comfortable for him. I
17 posit to you that's not how these operations work. Why do you
18 have to have it right away, you could have deferred this
19 interview like you did with Ms. Rivas. Well, we wanted to do
20 it right then. Well, of course you do. Right after the shock
21 and awe of guns pointed at everybody, right after 6:00 when
22 you've got control when they're afraid, they're pretty docile,
23 they're pretty controlled. The questions were asked, Did you
24 tell them you wanted to leave? Well, would anyone be expected
25 to tell armed agents I'm not going to do what you want? I ask

1 you to consider that.

2 They take him out to the car. Crystal Rivas watches.
3 I asked, Did you tell him he could bring anybody with him? No.
4 They tell you, well, he just walked out there on his own
5 consent. Walked out there of his own consent and spilled his
6 guts about all these things about child pornography. I even
7 asked Agent DePaola, so it's your position he just walks out
8 there and voluntarily tells you all these things. And she said
9 yeah. You, the jury, might want to ask yourself about whether
10 that's a voluntary statement, notwithstanding the clear
11 difference between what the defendant says and what the agents
12 say, but only the agents get to keep the notes. We don't have
13 a recording which would have given us both sides of the story
14 and I submit we wouldn't be arguing about this. I don't think
15 it's fair nor is it rational to say, well, we simply weren't
16 given body cams. Their purpose, admitted to by Ms. DePaola, is
17 to isolate the defendant one on one, to get incriminating
18 evidence against him to build their case. Is that voluntary?
19 I submit not.

20 Now, with regard to some of the details about the
21 laptop, if you'll remember, Agent Juarez said the deal, the
22 agreement to go and get the laptop, that all occurs in the
23 house. Agent DePaola said it was in the car. That's a pretty
24 important point. When did this discussion and agreement to go
25 and get them a laptop that they acknowledged they had

1 absolutely no access to by the Search Warrant, when did that
2 occur? Agent Juarez says it happened in the house. DePaola
3 says no, it happened in the car.

4 Well, I would ask you to consider whether either Agent
5 DePaola or Agent Juarez -- only one of them can be right, but
6 they oppose each other in their statements. What's another
7 thing that's kind of interesting and important? Well, when was
8 this discussion about stopping at McDonald's? Agent DePaola
9 told you it was when we were out driving, just came up while we
10 were driving. Agent Juarez said no, that discussion occurred
11 before they ever left. Kind of an important difference in
12 terms of your recollection. Kind of an important difference,
13 one that trained agents, one for 27 years and one for 16, not
14 the kind of detail they would forget or confuse. Nonetheless,
15 could the defendant have left? That's an interesting thing.
16 Agent DePaola was asked twice, Why did you go back in the
17 house? Well, we had to get the keys. I said, Your car was
18 running, you had your keys. Oh, yes. They had to go in and
19 get the defendant's keys because they had the keys, so he
20 wasn't free to leave. The only place he could have gone was
21 down the sidewalk or back in the house where the armed agents
22 were. Let's keep in mind, what is the defendant perceiving
23 here? My family is inside, hostages to armed agents. Do you
24 think that would control an individual? Did you think that
25 would undercut the voluntariness of all of this information

1 that they claim he said.

2 The defendant didn't fail to take the stand, he took
3 the stand. The government asked him, he said I didn't say
4 that. About the PTHC, he said no, they asked me if I knew what
5 pre-teen was. I said, well, young ones. Then they ask him
6 about PTHC and he said -- they ask him three times,
7 increasingly angry on the part of Agent DePaola. She actually
8 calls him a liar. And he says, ma'am, I actually don't know
9 what the acronym is. Now, they now try to weave that back into
10 Exhibit Seven, I believe, which is that there is a search
11 involving PTHC. Remember I ask Agent DePaola, you know all
12 these websites. Oh, I know too many of them.

13 So when the government says, well, they didn't know
14 this, they know every single website, this is what they do
15 every day is probably a better recognition. Why is that
16 important? He says they keep peppering him with questions.
17 Even Agent DePaola says no, I controlled all the questions.
18 You've got to view the demeanor of all of these witnesses here
19 in the courtroom. I submit Agent DePaola is quite forceful.
20 And certainly you're alone in a car with two agents with guns
21 while your family is being held hostage essentially from your
22 perspective by other armed agents. Why do we know that the
23 government really isn't all that concerned about the
24 limitations of their Search Warrant? Well, there's an
25 interesting thing. The consent to search the car, the truck

1 that is supposedly signed by the defendant, he says they just
2 handed it to me and I signed it on my leg, but interestingly
3 enough, they had already asked Crystal Rivas for the keys to
4 the Tahoe, the other vehicle. If they don't have a Search
5 Warrant for it, why didn't they get a consent from her? It's
6 because they're going to search whatever they want to search.
7 And that's exactly what they did. So they get a consent after
8 they've already searched outside the scope of the Warrant.
9 That is actually how they conduct themselves. They just say,
10 oh, sign this. They don't give him an opportunity to read it.
11 They don't give him an opportunity to question about it.
12 Interestingly enough, both Ms. Rivas and the defendant said --
13 were you allowed to talk to each other? Answer, no.

14 Ms. Rivas made it very clear she wasn't free to move
15 around the house. Remember, Agent DePaola said, oh, yeah, if
16 you need something, just ask. Well, that's funny because
17 Ms. Rivas said, I had to have my daughter go to school. And
18 what did she say? At first the agents told her no. Well, if
19 you're free to leave and free to go to school and that's really
20 what Agent DePaola or Agent Juarez said, that negotiation would
21 have never taken place.

22 Were you escorted throughout the house wherever you
23 went? Ms. Rivas says escorted upstairs, downstairs, her
24 daughter is escorted to the bathroom, to the room to get her
25 clothes, back to the kitchen. You're always having to ask.

1 That's not impeding the search. That's controlling every
2 single movement. There is no other logical conclusion about
3 that. So if you're looking about the atmosphere, it's pretty
4 clear that the atmosphere is we've got the guns. That's all
5 they need to do because there is, I would submit, no rational
6 human being that would defy them under those circumstances. So
7 if you're looking at what were the circumstances, the
8 conditions under which these disputed statements are made, it's
9 pretty clear they weren't voluntary.

10 COURTROOM DEPUTY CLERK: Ten minutes.

11 MR. RICHARD BARTOLOMEI: Now, one other thing I want
12 to point out. When you get to the business they said, oh,
13 well, he gets in the car, nobody accompanies him. Well, his
14 family is still there. He doesn't know. They're still in the
15 house when he leaves and again he's escorted out by the agents.
16 He has to be given his keys because he doesn't have them. They
17 drive. Now, here is where it gets a little murky. They said,
18 oh, well, we didn't get a consent because he could change his
19 mind. Well, I'm not sure that that's a very logical reason for
20 not getting the consent before he left, but the point is they
21 get him out there, they go through the door. And here is where
22 once again kind of critical facts that are very much different.
23 Remember, Agent Juarez said, I see the rifle leaning against
24 the wall. Agent DePaola matches the defendant. He tells them
25 voluntarily I have a loaded shotgun. She remembers the same

1 thing. I submit Agent Juarez didn't see a gun or a rifle
2 leaning up against the wall. It's exactly as the defendant.
3 You say, well, what does that give us or what does that tell
4 us? It tells you that the defendant is far more accurate in
5 his account. And wouldn't it be riveting in your mind and
6 etched in your mind what happens the first time you ever face
7 all those guns, all those agents. And he says I didn't consent
8 to go get it, they told me, We need to get that laptop.

9 Now, when did they discover that the laptop wasn't
10 there? They discovered the laptop that they were looking for
11 wasn't there when they went back in the house. Why? Because,
12 and you'll see it on the receipt, they already had a laptop
13 that was brand new, wasn't the right one. So they realize,
14 oops, it's not within my Search Warrant, I've got to have that
15 laptop. And why do they need to have that laptop? That's
16 their purpose. They don't want that laptop and the defendant
17 getting together, so they tell him, let's go get it. But when
18 you look at the details at the business, what does he say? And
19 remember this is very important, if he's agreed already to go
20 and give it to them, why would he ask them at the business,
21 Shouldn't you be showing me a Search Warrant?

22 Now, remember, Agent DePaola said -- because I asked,
23 Didn't he ask you that? And she said, Possibly.

24 His testimony was they said, We could get a Search
25 Warrant, they held up a piece of paper and said we have a

1 Warrant for all your electronic devices that you use.

2 They didn't. They had a Warrant for anything at the
3 residence. And then they tell him, You could go to jail while
4 we get one, but that may take a while. Then his testimony is,
5 I never read it, I was never offered it, she slaps it down, Ms.
6 Juarez, facedown with her hand over the text and says sign
7 here, which he dutifully does. Does that sound like a
8 voluntary consent to give them the computer? I leave that to
9 you. And then they go off, laughing. Oh, but one more thing.
10 He tells us, Don't go near your family until this investigation
11 is done. And he never goes home for five days and since that
12 time he hasn't lived there. They don't have a right to tell
13 him that. It's not in any Warrant, but it suits their purpose,
14 just like the private interrogation in the car, it suits their
15 purpose. And that renders all these statements -- even though
16 they're directly disputed by a defendant who took the stand to
17 face the cross-examination of the government, they're not
18 voluntary, notwithstanding that they're not accurate. And even
19 they acknowledge, well, there's no independent proof of what
20 they said, just what we say he said. But he denied and he
21 faced it.

22 Now, I'm going to step down and I won't be able to
23 argue with you again. I won't be able to talk because the
24 government will finish, but here is what I will say to you, I
25 am pretty sure the prosecution in their 17 minutes will come up

1 and very carefully try to deconstruct everything I've said. I
2 expect that. That's their duty. But as you're listening to
3 what she says and considering this evidence and talking amongst
4 yourself, ask yourself as she's speaking, If Rich could speak
5 one more time, what would he say? You're going to hear it in
6 your head, and that, ladies and gentlemen, is the voice of
7 reasonable doubt.

8 MR. EDWARD BARTOLOMEI: If it please the Court --

9 THE COURT: Your time is expired, counsel.

10 COURTROOM DEPUTY CLERK: He's got 4 minutes.

11 THE COURT: You've got four minutes.

12 MR. EDWARD BARTOLOMEI: If it please the Court,
13 Ms. Thompson, on behalf of my client, Mr. Jeffrey Michalik, on
14 behalf of my brother, on behalf of Mr. Perez, his defense team,
15 I'd like to start off by saying this, this has been a long
16 trial, it's been arduous, it's been highly contested and there
17 has certainly been an exchange between counsel on relevant
18 points of law. And now we come down to the issue of relevant
19 points of fact. If we have offended you in our representation
20 of Mr. Michalik, I would ask you this, please do not in your
21 verdict take into consideration or take it out against
22 Mr. Michalik. We are here fighting for him. Right here,
23 ladies and gentlemen, are the doors. This case started through
24 a set of doors. It really started in Switzerland on
25 photographs that allegedly came back to an IP address that were

1 never recovered, never recovered. And you remember I opened
2 the door and I said the key to the door was Switzerland. The
3 police walked through with a Warrant fishing for photos they
4 knew in advance weren't even on there, and in so doing,
5 discovered the issues here. Mr. Michalik told you from the
6 stand, under cross-examination and has always contended and the
7 instruction says it, a plea of not guilty is absolute statement
8 of what? Nonguilt. That's on page two. He said, I didn't
9 know about it, I don't know it was there.

10 And now we come down to some very, very important
11 decisions in this jury instruction. You're going to be asked
12 to describe what possession is. Here we have a piece of paper.
13 I have it in my hand. I don't know really what it is, but I
14 have it here. Are you going to say, well, Mr. Bartolomei,
15 because you have it in your hand, do you know what's in it?
16 You possessed it. Ironically it's a set of something else that
17 I haven't even read or seen. But because I have it, the
18 government would like you to know that because I did have it
19 that I knew what was in it and, quite frankly, I therefore am,
20 closed quotes, guilty of possessing pornography.

21 It's unrebutted and undisputed in this case that on
22 two separate dates, 27 minutes on the 18th on the 1st, on the
23 19th, the images that she says all came to the computer. And
24 ad nauseam everyone in this case has said but we cannot tell
25 you where it came from, who it came from and how it got there.

1 And there's no showing from any witness, the government's,
2 particularly, it's their case by the way, burden of proof, that
3 he ever opened it or knew it.

4 Now, the government will tell you, well, the entry
5 date, the access date, they all come at the same time if you
6 look at Six, but it doesn't really mean anything. We only care
7 about access. Well, it's all accessed on one day and that
8 confirms that they were dropped on the dates during the times
9 that they came. By the way, when we talk about the way it's
10 reported, it's reported from a machine, it's reported in not
11 our time, it's reported in standard time, London time. So if
12 it was October, it has to be daylight savings. Take six hours
13 off of that. And when does it all come in, most of it? Gee,
14 it comes during --

15 MS. THOMPSON: Your Honor, I'm going to object.
16 That's a misstatement of the testimony regarding the timing of
17 Exhibit Six.

18 MR. EDWARD BARTOLOMEI: No, it's not.

19 THE COURT: Well, okay, I'm going to let the jury make
20 their determination.

21 MR. EDWARD BARTOLOMEI: Thank you. When you look at
22 all of the images in there, different times, different places,
23 but six hours makes a huge difference because it comes in
24 during business hours.

25 COURTROOM DEPUTY CLERK: One minute.

1 MR. EDWARD BARTOLOMEI: Shortly after business hours.
2 And so, ladies and gentlemen, I'm going to ask you the
3 following, in the 45 seconds that I have left, do you see that
4 door right there? In the management of your most personal
5 affairs and the critical decisions that you need to make in
6 your life, three letters separate Mr. Michalik from walking out
7 of this courtroom. And I respectfully suggest that those three
8 letters "not" guilty are appropriate and should be applied in
9 this case. That, ladies and gentlemen, is what reasonable
10 doubt is all about and that is what in the management of your
11 most personal affairs you should take out of this courtroom.
12 Thank you.

13 THE COURT: Okay. Ms. Thompson.

14 MS. THOMPSON: Ladies and gentlemen, I'm going to try
15 and address this as quickly as I can, but this case comes down
16 to the testimony of the witnesses. You saw everybody testify
17 and you heard them testify. You need to determine for
18 yourselves who you believe because you either believe the
19 testimony of Special Agent Juarez and Special Agent DePaola or
20 you believe the testimony of the defendant. When you look at
21 the credibility of witnesses, you are told did the witness have
22 a personal interest in the outcome of the case.

23 I do agree that this case started in Switzerland with
24 the five images that were downloaded from the defendant's house
25 on October --

1 MR. RICHARD BARTOLOMEI: Objection, Your Honor. That
2 is a misstatement. It was to an IP address. There is no
3 showing and they weren't even found in the computer after it
4 was seized.

5 THE COURT: Now you're testifying here.

6 MR. RICHARD BARTOLOMEI: I'm just objecting it's a
7 misstatement of the record.

8 THE COURT: I will let the jury determine whether it's
9 a misstatement of the record. They heard the evidence.

10 MS. THOMPSON: You can look at the exhibits. And the
11 representative from AT&T said that IP address was assigned only
12 to the defendant during the time in question. They went to his
13 house. Both forensic analyst and agent, they can tell you
14 what's on the computer, they can't tell you who did what to the
15 computer. They can't tell you who was sitting behind the
16 keyboard. They can only tell you what happened on the
17 computer. And both of them told you the only operating system
18 on that computer is Windows 10. And you'll see that in the
19 forensic report that we've reviewed in this case, on item
20 three. If Windows 10 computers have two different operating
21 systems on it? Yes. And if there was another operating system
22 in another partition, it would have shown up in that report.

23 MR. RICHARD BARTOLOMEI: Objection, Your Honor,
24 misstatement of the record. They did not testify --

25 THE COURT: All right. I'm not going to put my

1 recollection in there. I'm going to leave it to the jury.

2 MS. THOMPSON: Look at the evidence in this case. The
3 other thing Special Agent Nutt testified to was that there was
4 a design program run on the computer. So a computer operating
5 in Windows 10 was able to operate the design program on a
6 number of different days.

7 With regard to the security ID, Special Agent Nutt
8 testified that there's only one security ID because there's
9 only one computer user. I don't know if defense counsel is
10 referring to the security IDs of the accounts on the desktop,
11 but remember, there was a desktop computer and that information
12 is contained in section one and two. And the desktop computer
13 at the house had a number of different accounts, including the
14 Log Me In account and Jeff, C. Rivas, Jeff admin, J. Michalik.
15 That had a number of different accounts, so it will have a
16 different security ID for each account. That has absolutely
17 nothing to do with the laptop computer that had all the child
18 pornography on it. That only has one user account and one
19 security ID. That is a non-issue.

20 The five files that were downloaded from the website
21 in Zurich Switzerland were not found on the laptop computer.
22 We know that they were downloaded to Jeffrey Michalik's house
23 on August 4th of 2014 because they connected it to his IP
24 address which is a secure Internet connection. We don't know
25 what computer was used to download those images and they were

1 not found on the Dell laptop computer. Why wouldn't they have
2 been found? That was a few months before the execution of the
3 Search Warrant. And remember, the defendant was using C
4 Cleaner. C Cleaner is a program that deletes what are
5 considered to be useless files to the user, all the background
6 files and stuff that you don't need on your computer is gone,
7 is deleted so that your computer can run faster. The user has
8 to tell the program, the C Cleaner program what to delete and
9 what not to delete. The fact that those files weren't found on
10 his computer doesn't mean anything. The fact that they were
11 downloaded to his house where only somebody who knew the name
12 of the Internet router and the password to it would be able to
13 download those, that is significant to you. It goes to
14 knowledge. It goes to did he knowingly possess child
15 pornography on that laptop. And that's really what you have to
16 decide. I would suggest that the first three elements are very
17 simple. It's the last one. Did the defendant knowingly
18 possess the child pornography, did he know that there was child
19 pornography on the laptop. If you look at all the evidence in
20 this case, including his testimony, I believe that you will
21 find he did. Remember when I showed him Exhibit Five and he
22 testified he didn't -- that wasn't how he remembered seeing it.
23 He identified only the child's vagina, but he did acknowledge
24 he recognized both of those images. There is somebody --

25 MR. RICHARD BARTOLOMEI: That's a misstatement.

1 Testimony was about legs.

2 MS. THOMPSON: You can look at the image and see how
3 what part of legs are even on the file and what that looks
4 like. I realize I was standing in the way of most of you when
5 that testimony happened, but you can review the image for
6 yourself and determine what that shows.

7 The grandmother and the child were allowed to leave
8 the house. They did leave the Search Warrant so that the child
9 could go to school. Really it comes down to do you believe the
10 defendant or do you believe the special agents. How would
11 those special agents even know that that laptop existed if the
12 defendant didn't tell them? How would they know that? Where
13 would they get that information from? The defendant took the
14 stand and he told you, I never said anything about it. Agent
15 DePaola just miraculously figured it out.

16 And what motive did they have to not be honest in this
17 case? You can tell who has a personal --

18 MR. RICHARD BARTOLOMEI: Your Honor, that is
19 bolstering and is improper bolstering. The motive is to make a
20 case which they testified to.

21 THE COURT: The government does not stand behind any
22 witness and in terms of their truthfulness. It is for you to
23 decide which witnesses are truthful and which witnesses are not
24 truthful, including the agents. I don't think you meant to
25 vouch for the witness's honesty, did you?

1 MS. THOMPSON: No, I'm asking them to determine who is
2 credible.

3 THE COURT: Because the government never vouches for
4 witnesses, that's against the rules. Go ahead.

5 MS. THOMPSON: It was argued that the defendant was
6 upset that his family was being held hostage at the Search
7 Warrant. After he provided the laptop to law enforcement, he
8 never went home to check on his family. He didn't go home for
9 five days, five days. As he's leaving the house, his fiance
10 yells, What the F is going on? If any of this is true, I'll
11 F'ing kill you!

12 That's what he heard right before he left the house.
13 And he knows what he said to law enforcement. He knows what he
14 told them, even though he said he graded his honesty only an
15 eight out of ten, he knows what he told them. He knows what
16 was on the computer. He knows what happened.

17 Ladies and gentlemen, if you believe the defendant, if
18 you believe the testimony of the defendant, then he's not
19 guilty. If you believe the testimony of the special agents in
20 this case, then I would suggest the evidence in this case has
21 proved well beyond a reasonable doubt that the defendant is the
22 one that knowingly possessed child pornography on that laptop
23 computer on October 22nd when he handed it over to law
24 enforcement and I would ask that you find him guilty of that
25 offense charged. Thank you.

1 THE COURT: All right. Thank you. All right, ladies
2 and gentlemen, you have now heard all of the evidence in this
3 case, you heard the Court's instructions and you've heard the
4 final argument. We have one alternate left. We can only
5 deliberate with 12 and we have 13 jurors, so at this time with
6 the thanks of the Court and with full appreciation for your
7 service, I'm going to excuse our alternate in the corner there
8 and you can go home. I am going to keep you under the Court's
9 order, though, not to discuss this matter with anyone until we
10 get a verdict in this case. And you will be notified what the
11 verdict is by Priscilla, she'll call you okay. So you can step
12 out now and leave. All right. Thank you very much and you're
13 going to get full credit, so you shouldn't be seeing us for a
14 while.

15 Ladies and gentlemen, we're going to now send you --
16 where is the verdict form? The verdict form is as simple as it
17 can be. It just says, We, the jury, unanimously find the
18 defendant, it's got his name there, guilty, there's a line, or
19 not guilty. And the foreperson who you're going to select
20 right away is going to mark that verdict, sign it and then let
21 the Court guard here know that you have reached a unanimous
22 verdict. Remember, all 12 of you have to agree before you
23 reach a unanimous verdict. In some State courts it can be ten
24 to two. Not here, it has to be all 12. Remember, here in
25 Federal Court, there is never a place for either sympathy or

1 prejudice. You decide this case purely and only on the facts
2 as you find them and as the law that I have instructed you.
3 Now, time-wise here is what's going to happen. You can
4 deliberate today only for about another half an hour and then
5 they're going to close the building. If you don't reach a
6 verdict in half an hour, then you have to come back on Tuesday
7 because Monday is a holiday. If you don't reach a verdict and
8 you have to come back on Tuesday, please remember over the
9 weekend, and it's a long weekend, it's just like when you were
10 off when we had to take Thursday and Friday off and we had the
11 two days of the weekend, same thing, okay? All right. Thank
12 you very much. Good luck in your deliberations.

13 COURT SECURITY OFFICER: Rise for the jury.

14 THE COURT: One more thing, jurors often ask me Judge,
15 how long -- did we deliberate long enough? And I can tell you
16 that I had a nine-month case once on and off it was a civil
17 case -- not nine months, I'm sorry, a four-month, a four-month
18 case and the jury came back in about an hour and ten minutes
19 with a verdict that was supported by the record. I also had a
20 three-day trial and it took them two weeks to come back. Was
21 one too long and one too short? No. It all depends upon how
22 you view the evidence. You've heard all the evidence. And as
23 long as you reach a unanimous verdict after properly
24 deliberating that you are comfortable with in accordance with
25 the standards under the law, then that's your verdict. Okay.

1 Thank you.

2 *(Jury exits.)*

3 * * *

4 THE COURT: Counsel can be seated. So I have a rule
5 -- you can be seated.

6 MR. EDWARD BARTOLOMEI: Thank you, Your Honor.

7 THE COURT: I have a rule in my court that counsel and
8 the defendant must be within 15 minutes of this courtroom at
9 any time when the jury is deliberating. We can't have counsel
10 off somewhere way across town and we're waiting 30 minutes or
11 40 minutes in traffic for them to get here in case we have a
12 jury question. It just doesn't work. Obviously today we're
13 going to send them home at 4:30. They may reach a verdict
14 before then, I don't know. I had a case -- Priscilla would
15 remember, she's not here, but we sent the jury out, I got back
16 to my chambers, took my robe off, sat down and took one
17 telephone call and they came in and told me the jury's got a
18 verdict. It took like six to ten minutes. Who knows? I also
19 remember that case, it was three days and we kept waiting,
20 waiting, waiting, waiting and it took them two weeks to reach a
21 verdict. So I've given up on trying to figure that out. I
22 think that's about it that we need to cover. If you haven't
23 heard from us by 4:30, then you can just take off. And then
24 just make sure that you're around on Tuesday. I will be here
25 probably doing sentencings. I don't know what's going on now.

1 They've had to move my calendar around. I moved back my Austin
2 trip because I wanted to be sure I was here for as long as
3 possible. Is there anything anybody would like to put on the
4 record?

5 MS. THOMPSON: Nothing from the government.

6 MR. EDWARD BARTOLOMEI: Happy Labor Day.

7 THE COURT: I want to thank counsel. I know that it's
8 been a hard fought case, both of you have very strong opinions
9 about this case and I understand that and I appreciate it. And
10 I recognize that there have been some clashes between counsel
11 from time to time, but all in all I think that given the
12 subject matter in this case and actually very few of these
13 cases actually go to trial, probably 99 percent of them plead
14 probably.

15 MS. THOMPSON: Probably 97.

16 THE COURT: 97, 99 percent are pled. So these are
17 difficult cases when they go to trial because there's very
18 strong feelings, the subject matter is tough and, you know,
19 that's what our Constitution is all about. I always like to
20 remind the jury that Abraham Lincoln who was one of the great
21 lawyers in our history, people forget about that, they think he
22 was just some kind of a backwoods lawyer, he still holds the
23 record for the most appearances before the Illinois Supreme
24 Court. He tried cases left and right. Somebody just wrote a
25 book about his last murder trial. He was a defense lawyer, he

1 was a civil lawyer, he was a prosecutor, he was a great lawyer.
2 He called the Federal Court the ultimate temple of justice and
3 it is. So we have to think of it that way and the lawyers here
4 are far more important than I am. All of the lawyers here are
5 officers of this court, I'm an officer of the court. But your
6 role here is much more important than mine. Well, I will see
7 you at some point along the way and if I don't see you before
8 4:30, have a nice weekend.

9 COURT SECURITY OFFICER: All rise.

10 (4:03 p.m.)

11 * * *

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: October 8, 2019

/s/ Angela M. Hailey

Angela M. Hailey, CSR, CRR, RPR, RMR
Official Court Reporter
655 East Cesar E. Chavez Blvd., Third Floor
San Antonio, Texas 78206
(210)244-5048